In the Supreme Court

of the United States

No. 460, October Term, 1938

I. W. LANE, *Petitioner,*

VERSUS

JESS WILSON, JOHN MOSS AND MARION PARKS,
Respondents.

BRIEF OF RESPONDENTS.

(ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT.)

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INDEX.

PAGE

SUBJECT INDEX.

I.

Plaintiff cannot in the same action both assert that he Oklahoma Registration Statutes are void, and rely pon them. If the statutes are void, as he contends, egistration would have been a vain thing. Accepting he allegations of the petition for the purposes of this ase only, and this Court should so accept them without assing upon the validity of the challenged statutes, it ust be held that plaintiff has not been damaged and annot recover, for if these allegations are taken as true, or the purposes of the case, he had the right to vote ithout registration. The plaintiff thus has foreclosed imself from invoking the several questions of law and f fact which he seeks to present. For these and other easons hereinafter shown, plaintiff has not stated a ause of action. He presents no federal question for ecision 11

II.

Myers v. *Anderson*, 238 U. S. 368, 59 L. ed. 1349 pon which plaintiff relies, does not support the contention that plaintiff can proceed against the registration officer. In fact, the doctrine announced in *Myers*

PAGE

VI.

It conclusively appears that in fact plaintiff Lane never applied for registration to the 1916 precinct registrar. It was so held in the Circuit Court of Appeals (R. 100). There is no proof that the 1916 registrar in the precinct where plaintiff lived ever refused registration of any colored voter who applied to him. There is no evidence that any colored voter in Wagoner County was ever wrongfully denied registration, upon proper application 47

VII.

There was no proof of conspiracy upon the part of the defendants, or any of them, to deny negroes the right of registration. The Circuit Court of Appeals so held (R. 100) 51

VIII.

The Oklahoma Registration Statutes do not violate any of the constitutional provisions invoked by plaintiff. They cannot be overthrown by any or all the applicable rules for interpretation.

No resort can be had to administrative results or other extraneous matters, for the statutes are not ambiguous or of doubtful meaning.

The challenge for alleged discrimination is not sustainable. The sole test of the constitutionality of the alleged discriminatory provisions is this: Were those who did not vote in 1914 subjected in 1916 to the same standard of qualification as to the right to vote, as those who had voted in 1914?

(a) Statutes which are clear and unambiguous, as in the instant case, when challenged upon constitutional grounds, must be tested from the statutory provisions themselves, unaided by extraneous facts with respect to the manner in which they have been

) An examination of all the cases where registration laws have been stricken down upon the ground that they were discriminatory, shows that in every instance the statutes in question were overthrown because as to a given and complaining class statutory requirement was made for subjecting that class to an additional or different standard of qualifications to vote than that required of others. Exactly the same standards of qualifications to vote have always been required under the registration law of Oklahoma, as to all classes. The election officers at the polls in 1914 tested the voters by the same standards applied by the registrars in 1916. Petitioner's contention that the statutes are discriminatory appears to be without precedent..... 71

) Petitioner's contention that the Oklahoma Registration Law is void because of the time limit for registration is not well founded..... 71

) Further as to petitioner's contention that the negroes of Oklahoma were discriminated against by the statutory provisions making it the duty of precinct registrars to issue registration certificates to qualified electors who voted in the general election of 1914..... 74

TABLE OF CASES.

CONSTITUTIONAL PROVISIONS.

STATUTES.

INDEX—Concluded.

In the Supreme Court of the United States

No. 460

OCTOBER TERM, 1938.

I. W. LANE, *Petitioner,*

vs.

JESS WILSON, JOHN MOSS AND MARION PARKS, *Respondents.*

(ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT.)

BRIEF *of* RESPONDENTS.

Statement.

Petitioner's brief does not accurately state the evidence. In the interest of brevity respondent will not restate the case, but merely point out the more glaring misstatements and omissions to to be found in petitioner's brief. Petitioner's so-called "Preliminary Statement" found in his brief at pages 7 to 11 is purely argumentative, and is in fact nothing more than petitioner's own conclusions summarizing his whole argument. There is nothing in the record to show, as alleged in petitioner's brief, that this case is the climax of twenty-five years litigation involving the right of negroes to vote in Oklahoma, or that they have

been denied said right in the State, or in Wagoner County, but in truth and in fact the record shows that large numbers of negroes are registered and voted throughout the State (R., p. 48).

Petitioner makes a further attempt to charge the State of Oklahoma with alleged wrongful conduct by the statement found at pages 9 and 10 of his brief, to the effect that the Legislature convened immediately after the fall of the "Grandfather Clause" to enact the Registration Law of 1916 which he alleges continued the operation of said "Grandfather Clause", and had the effect of disfranchising Lane and others.

There is nothing whatsoever in the entire record to support or lend the least credit to this statement. This Court judicially knows that the decision in the *Guinn* case was rendered June 21, 1915, and that it was more than seven months later, as shown by the records of its proceedings, of which this Court will take judicial notice, that the Legislature convened in special session. And it is further shown by the records of such legislative proceedings that the said Legislature considered many and varied subjects concerning the affairs of the State generally; that the Registration Law was not in fact passed and approved until February 26, 1916. (See, Session Laws of Oklahoma 1916.)

Petitioner's purported summary of the evidence with respect to who was the 1916 registrar in plaintiff's precinct omits almost entirely both the oral and documentary evidence, which shows that Pace was the sole registrar in said precinct at the two registration periods in 1916. Petitioner fails to state that he himself introduced the only available public record of Wagoner County showing the lists of the voters registered in 1916 in said precinct, Gatesville number one, to-wit: Pages 71 and 72, volume one of the Coun-

ty Register of Election, which record, together with the supporting evidence, shows that Pace was the registrar in said precinct for both of the 1916 registration periods (R., pp. 39, *et seq.*). Petitioner further fails to show that the various registration certificates—originals produced by the voters themselves—were introduced in evidence, showing that same were issued and signed by Pace in the 1916 registration periods (R., pp. 40 to 42). Petitioner further fails to show that in addition to the testimony of Pace that he was the registrar at both of the 1916 registration periods, five other witnesses testified to the same effect. Thus it appears that petitioner omitted from his statement, almost in its entirety, the evidence upon which the Circuit Court of Appeals of the Tenth Circuit based its finding that Lane did not in fact apply for registration in 1916, which was the date for making the permanent registration lists of the voters, subject to additions to be made thereto from time to time, as provided by the statutes.

Petitioner, perhaps inadvertently, omits any mention of the testimony of one Jim Biggerstaff, whose testimony in the former trial of this cause was, by stipulation of the parties read in evidence, which testimony was to the effect that he was editor and custodian of the records of the Wagoner County Democrat, a newspaper of general circulation in Wagoner County, for the year 1916, and that such records show that in the issue of April 27, 1916, there was published a list of the registration officers for that year, which list included the name of James L. Pace as precinct registrar for Gatesville precinct number one (R., pp. 44 and 45).

We do not undertake, as a part of respondents' statement, to point out many misstatements of fact which appear in the course of the argument upon behalf of the petitioner. The argument so commingles questions of fact with the brief writer's conclusions that the purported state-

ments of fact in course of the argument are, it seems to us, quite unreliable. For illustration the following:

At page 66 of petitioner's brief it is said:

> "It is not controverted that petitioner made application for registration, at the proper time, and that he was refused registration."

The respondents contended throughout the trial, and upon appeal, that the petitioner, Lane, never did apply for registration at the proper time and that Parks was without authority to register Lane in 1934.

At page 69, the brief writer, whilst undertaking to show that the respondent, Moss, participated in an alleged conspiracy, states:

> "* * * respondent John Moss admitted instructing Parks about the registraion law; and reading to Parks, as a statement of the law, a certain letter he had received which construed the law as contended by respondents (R. p. 48)."

The letter discredits the above statement, insofar as it is invoked upon the conspiracy theory. It is as follows:

> "Headquarters
> Negro Democratic State Organization
> 228½ North Second Street
> Muskogee, Oklahoma.
>
> June 20, 1934
>
> Mr. J. M. Biggerstaff, Editor,
> The Wagoner Record
> Wagoner, Oklahoma.
>
> Dear Sir:
>
> A word from one Democratic editor to another—I am, as you will notice, Publicity Director of the Negro Democrats of the state. There has come to my attention that an effort will be made to discredit Ne-

groes of the state in that they are forced to register as Democrats. I know here in this county and in other counties where Negroes have registered in large numbers, no efforts were made to force them to register as Democrats.

At the approaching registration period I hope no efforts will be made in your county to force Negroes to register as Democrats or to prevent the few elligible under the law from registering.

There will not be more than 100 in your entire county elligible to vote at this time under the law, which only allows those coming of age since last registration time or who have moved into the state one year since last registration and, of course, have lived in the county and precinct the required time.

Negroes in this county are mostly registered Democrats because they are anxious to have a voice in selecting public officials. Certainly we would not expect violating our laws to begin at registration periods.

Hoping all will end well for us, we are

Very truly yours,

C. G. Lowe, Editor

The Muskogee Lantern, Negro Democratic Newspaper and Publicity Manager Negro Democratic State Organization."

The respondent, Moss, merely admitted that in his opinion the foregoing letter correctly construed the Oklahoma Registration Law applicable to the 1934 registration, and that he had shown the letter, with a statement of his opinion with respect thereto. It will be noted that the respondent, Moss, merely exhibited the foregoing letter, which was by the Publicity Director of the Negro Democrats of the State of Oklahoma, and stated in substance that in his opinion the State Director had correctly con-

strued the Oklahoma Registration Law. The evidence does not show that this respondent did anything whatsoever even tending to connect him with the alleged conspiracy. (The evidence does not connect the respondent Wilson with the alleged conspiracy.)

At page 39 of petitioner's brief it is said that those who voted in 1914 could continue to vote thereafter without being registered at all. This is not correct.

At page 61 of petitioner's brief it is said:

> "* * * Very probably, persons who were not citizens, and also felons, convicts, paupers, idiots and lunatics actually voted in fulsome hordes in 1914, under the Grandfather Clause— under the terms of the Grandfather Law, every felon, pauper, and idiot in the state could vote who could prove that he was on 'January 1, 1866 * * * entitled to vote', etc. * * * Yet by the effect of Sec. 5654, every alien, felon, idiot or lunatic who voted in 1914 under the Grandfather Law, whether in consonance with its spirit or contrary to its terms, is today duly qualified to vote, despite the requirements of said Sec. 1, of Article III, of the State Constitution."

Said section 1, article III of the State Constitution as originally adopted in 1907 has always been in force since its adoption. After stating the qualifications of electors, there was a proviso, as follows:

> "* * * Provided, that no person adjudged guilty of a felony, subject to such exceptions as the Legislature may prescribe, nor any person, kept in a poorhouse at public expense, except Federal, Confederate and Spanish-American ex-soldiers or sailors, nor any person in a public prison, nor any idiot or lunatic, shall be entitled to register and vote."

We, therefore, challenge the above quoted statement in petitioner's brief as wholly unfounded.

As an illustration of petitioner's confusion of theories and his misconception of the facts, attention is called to the statement at page 39 of his brief, that Lane had *only ten days in this life* within which to register and preserve the privilege of franchise. Here the petitioner positively commits himself to the theory that the respondent, Parks, the 1934 registrar in petitioner's precinct, had no authority whatever under the law to register petitioner, yet failure of Parks to register Lane is the alleged ground for this suit in damages. In other words, whilst saying that Parks had no authority under the challenged Registration Statutes to register Lane, petitioner charges the respondents with gross wrongs, because Parks did not register Lane in 1934.

For want of reliability of statement in petitioner's brief, we are under the necessity of suggesting, most respectfully, an examination of the very short record which covers the facts involved.

Respondents contend that the record and petitioner's brief, considered as a whole, commit the petitioner irretrievably to this absurdity, to-wit: Petitioner says that the Oklahoma Registration Statutes are utterly void. He admits that he, the petitioner, declined to comply with the requirements of the Registration Law, because he believed same to be unconstitutional. He claims that he applied at the general registration period in 1916 for registration, and that upon the denial of his application he declined to appeal, as required by the statute. He says as one of the grounds for declaring the challenged statutes unconstitutional, that he had only ten days within which to register, or be forever barred, and that this ten-day period was in 1916. Yet he sues Parks, the 1934 registration officer of petitioner's precinct, for failure of Parks to register petitioner in 1934, at the same time saying that under the Oklahoma law Parks had no authority to register him in 1934. Re-

spondents claim that there is no theory, whatsoever, presented, upon which recovery can be had, and that the pretended action is wholly without any precedent to support it, and contrary to reason.

OUTLINE OF CONTENTIONS UPON BEHALF OF DEFENDANTS, THE RESPONDENTS.

I.

Defendants contend that plaintiff's own petition and theory foreclose him from the recovery of damages, because if the registration statutes of Oklahoma are void, as claimed by plaintiff, he had the right to vote without registration, and therefore no damage was done.

The principal object of the petition is to procure a decision holding that the Oklahoma statutes with respect to registration are unconstitutional and therefore void. Plaintiff's contentions center upon this theory. He seeks to recover damages from the 1934 precinct registrar for denial of registration, and joins the other defendants for alleged conspiracy.

II.

Defendants further contend that plaintiff should have demanded his right to vote at the polls, and if there denied, he should have sued the election officers rather than the registrar.

III.

Defendants contend that regardless of the validity or invalidity of the Oklahoma Registration Law, and regardless of the manner of its administration, it cannot be held that plaintiff has sustained any actionable injury.

IV.

Defendants contend that the first registration period in 1916 was the time when plaintiff was required to register, and that if application was then made and wrongfully denied, as alleged, plaintiff's exclusive remedy was by appeal to the courts as provided by the statutes. This remedy he did not invoke.

V.

Defendants further contend that the 1934 registrar had no authority, under the statutes or otherwise, to register plaintiff in 1934.

VI.

Defendants further contend that in fact, as shown by plaintiff's own admissions and other conclusive evidence, plaintiff did not apply to the then registrar for registration in 1916.

VII.

Defendants say that petitioner's brief does not accurately or fairly state the evidence, and that in fact there was no evidence of conspiracy or other wrongdoing upon the part of the defendants, or any of them.

VIII.

Defendants contend that the challenged provisions of the statutes are constitutional and valid. They cannot be overthrown under the rules for statutory interpretation here applicable.

The registration statutes are clear and unambiguous, and hence do not permit of resort to administrative results or other extraneous matters for their interpretation.

These statutes are not discriminatory. The test as to qualifications for registration in 1916 was the same as that which the 1914 voters had met. Lane was never subjected to the provisions of the "Grandfather Clause"; hence he cannot be heard to complain of the illegal test or standard in those void statutory provisions.

NOTE: Throughout the proceedings defendants contended that the petition did not state a cause of action. They objected to the introduction of any evidence on this ground. At the conclusion of all the evidence defendants moved for a directed verdict in their favor, which motion was sustained.

I.

Plaintiff cannot in the same action both assert that the Oklahoma Registration Statutes are void, and rely upon them. If the statutes are void, as he contends, registration would have been a vain thing. Accepting the allegations of the petition for the purposes of this case only, and this Court should so accept them without passing upon the validity of the challenged statutes, it must be held that plaintiff has not been damaged and cannot recover, for if these allegations are taken as true, for the purposes of the case, he had the right to vote without registration. The plaintiff thus has foreclosed himself from invoking the several questions of law and of fact which he seeks to present. For these and other reasons hereinafter shown, plaintiff has not stated a cause of action. He presents no federal question for decision.

Petitioner bases his alleged right of recovery solely upon his contention that the Registration Laws of Oklahoma are void. The Circuit Court of Appeals so stated petitioner's theory (R., p. 100). As to petitioner's theory also see various excerpts hereinafter set forth under this head, taken from petitioner's pleading, assignments of error, and brief.

Giles v. *Harris*, 189 U. S. 475, 47 L. ed. 909, conclusively supports the contention that plaintiff cannot, whilst asserting the invalidity of the registration statutes, recover for denial of registration. The bill in equity was brought by a colored man for himself and on behalf of more than five thousand other negro citizens of Montgomery, Alabama, similarly situated, against the board of registrars of that county. The prayer of the bill was that the defendant registrars should be required to register the plaintiff and others similarly circumstanced. The bill alleged the com-

plainant's qualifications as an elector, showed his application and the application of more than five thousand other negroes of the county for registration, and the denial of registration. It was alleged that the refusal was arbitrary on the ground of their color, and it was further claimed that the same thing had been wrongfully done all over the state of Alabama. It was further charged that the white population of Alabama had framed the state constitution so as to afford a fraudulent instrument giving opportunity to effect wholesale fraud and wrongful denial of the right of negroes to be registered. The bill set forth the material sections of the state constitution and the general plan about which complaint was made, which general plan, as stated by this Court, was as follows:

> "By Sec. 178 of article 8, to entitle a person to vote he must have resided in the state at least two years, in the county one year, and in the precinct or ward three months, immediately preceding the election, have paid his poll taxes, and have been duly registered as an elector. By Sec. 182 idiots, insane persons, and those convicted of certain crimes are disqualified. Subject to the foregoing, by Sec. 180, before 1903 the following male citizens of the state, who are citizens of the United States, were entitled to register, *viz: First.* All who had served honorably in the enumerated wars of the United States, including those on either side in the 'war between the states.' *Second.* All lawful descendants of persons who served honorably in the enumerated wars or in the war of the Revolution. *Third.* 'All persons who are of good character and who understand the duties and obligations of citizenship under a republican form of government.' As we have said, according to the allegations of the bill, this part of the Constitution, as practically administered and as intended to be administered, let in all whites and kept out a large part, if not all, of the blacks, and those who were let in retained their right to vote after 1903,

when tests which might be too severe for many of the whites as well as the blacks went into effect. By Sec. 181, after January 1, 1903, only the following persons are entitled to register: *First.* Those who can read and write any article of the Constitution of the United States in the English language, and who either are physically unable to work or have been regularly engaged in some lawful business for the greater part of the last twelve months, and those who are unable to read and write solely because physically disabled. *Second.* Owners or husbands of owners of 40 acres of land in the state, upon which they reside, and owners or husbands of owners of real or personal estate in the state assessed for taxation at $300.00 or more, if the taxes have been paid, unless under contest. By Sec. 183 only persons qualified as electors can take part in any party action. By Sec. 184 persons not registered are disqualified from voting. By Sec. 185 an elector whose vote is challenged shall be required to swear that the matter of the challenge is untrue before his vote shall be received. By Sec. 186 the legislature is to provide for registration after January 1, 1903, the qualifications and oath of the registrars are prescribed, the duties of registrars before that date are laid down, and an appeal is given to the county court and supreme court if registration is denied. There are further executive details in Sec. 187, together with the above-mentioned continuance of the effect of registration before January 1, 1903. By Sec. 188, after the last mentioned date, applicants for registration may be examined under oath as to where they have lived for the last five years, the names by which they have been known, and the names of their employers. This, in brief, is the system which the plaintiff asks to have declared void."

This Court, having analyzed the bill, held that its principal object was to obtain registration. *Without passing upon the constitutionality of the challenged Alabama laws, it was*

held that recovery could not be had because plaintiff alleged that the Alabama laws relating to registration were void, and at the same time invoked the alleged void laws in the same proceeding. The following from the opinion, which was by the learned Justice HOLMES, squarely supports the defendants in this case:

> "The difficulties which we cannot overcome are two, and the first is this: The plaintiff alleges that the whole registration scheme of the Alabama Constitution is a fraud upon the Constitution of the United States, and asks us to declare it void. But, of course, he could not maintain a bill for a mere declaration in the air. *He does not try to do so, but asks to be registered as a party qualified under the void instrument. If, then, we accept the conclusion which it is the chief purpose of the bill to maintain, how can we make the court a party to the unlawful scheme by accepting it and adding another voter to its fraudulent lists?* If a white man came here on the same general allegations, admitting his sympathy with the plan, but alleging some special prejudice that had kept him off the list, we hardly should think it necessary to meet him with a reasoned answer. But the relief cannot be varied because we think that in the future the particular plaintiff is likely to try to overthrow the scheme. *If we accept the plaintiff's allegations for the purposes of his case, he cannot complain. We must accept or reject them.* It is impossible simply to shut our eyes, put the plaintiff on the lists, be they honest or fraudulent, and leave the determination of the fundamental question for the future. If we have an opinion that the bill is right on its face, or if we are undecided, *we are not at liberty to assume it to be wrong for the purposes of decision.* It seems to us that unless we are prepared to say that it is wrong, that all its principal allegations are immaterial, and that the registration plan of the Alabama Constitution is valid, *we cannot order the plaintiff's name* to be registered. It is not an answer

to say that if all the blacks who are qualified according to the letter of the instrument were registered, the fraud would be cured. In the first place, there is no probability that any way now is open by which more than a few could be registered; but if all could be, the difficulty would not be overcome. *If the sections of the Constitution concerning registration were illegal in their inception, it would be a new doctrine in constitutional law that the original invalidity could be cured by an administration which defeated their intent. We express no opinion as to the alleged fact of their unconstitutionality beyond saying that we are not willing to assume that they are valid, in the face of the allegations and main object of the bill, for the purpose of granting the relief which it was necessary to pray in order that that object should be secured.*" (Italics ours.)

With respect to plaintiff's claim that the Oklahoma registration laws were enacted by the white people of the state for the purpose of defrauding the negroes of the right of suffrage, attention is called to the further statement regarding the claims of Giles, as follows:

"The other difficulty is of a different sort, and strikingly reinforces the argument that equity cannot undertake now, any more than it has in the past, to enforce political rights, and also the suggestion that state constitutions were not left unmentioned in Sec. 1979 by accident. In determining whether a court of equity can take jurisdiction, one of the first questions is what it can do to enforce any order that it may make. This is alleged to be the conspiracy of a state, although the state is not and could not be made a party to the bill. *Hans* v. *Louisiana*, 134 U. S. 1, 33 L. ed. 842, 10 Sup. Ct. Rep. 504. The Circuit Court has no constitutional power to control its action by any direct means. And if we leave the state out of consideration, the court has as little practical power to deal with the people of the state in a body. The bill imports that the great

> mass of the white population intends to keep the blacks from voting. To meet such an intent something more than ordering the plaintiff's name to be inscribed upon the lists of 1902 will be needed. If the conspiracy and the intent exist, a name on a piece of paper will not defeat them. Unless we are prepared to supervise the voting in that state by officers of the court, it seems to us that all that the plaintiff could get from equity would be an empty form. Apart from damages to the individual, relief from a great political wrong, if done, as alleged, by the people of a state and the state itself, must be given by them or by the legislative and political department of the government of the United States."

Clearly, plaintiff's petition primarily presents a dilemma from which he has no escape, under the sound and uniformly applied rule above stated in this decision by this Court. His main effort, upon the whole, is to show that the very statutes which he invokes are void. *This Court cannot make for plaintiff a theory.* Without doubt he is here bound by his own theory as shown by his petition, his contentions at the trial, the assignments of error, and his brief, to all of which we shall refer more fully directly.

If the statutes are void, as alleged, it is as if they had never been, and rights cannot be acquired or built up under them, and no proceeding can be had against anyone for refusing to conform to the void statutes. In Cooley's Constitutional Limitations, 6th Edition, p. 222, it is said:

> "When a statute is adjudged to be unconstitutional, *it is as if it had never been. Rights cannot be built up under it;* contracts which depend upon it for their consideration are void; it constitutes a protection to no one who has acted under it, *and no one can be punished for having refused obedience to it* before the decision was made." (Italics ours.)

Plaintiff, whilst saying that there was no registration law operative within the State of Oklahoma, sues the defendant registrar for alleged failure to conform to the statutes and do for the plaintiff a vain thing, which plaintiff himself asserts would have been void. The underlying reason for denying plaintiff the right to both assert that a statute is void and rely upon it in the same proceeding, is manifestly sound. But few attempts have been made in federal courts to do the unreasonable and impossible thing which plaintiff undertakes. Hence, there are not many federal cases announcing the rule, though there are many state decisions which support it.

The decision in *Hurley* v. *Commission of Fisheries of Virginia*, 257 U. S. 223, 66 L. ed. 206, is grounded upon the same principle that controlled in *Giles* v. *Harris, supra.* Appellant Hurley applied for an injunction to restrain the Commission of Fisheries from removing the stakes and marks which designated the boundaries of certain oyster grounds in the Rappahannock River, planted by appellant, and which he claimed the right to occupy, and thereby opening the grounds for public use. The appellant asserted that the Commission was proceeding under a state statute invalid because it failed to provide for proper notice and hearing, and that the proposed action of the Commission would deprive appellant of his property without due process of law, contrary to the Fourteenth Amendment. This Court held that the appellant had no right to injunction, because his action was necessarily based upon a statute under which the Commission was acting, and that the appellant could not in the same proceeding both assail the statute and rely upon it. The opinion is in part as follows:

> "A majority of the three judges composing the court below concluded (264 Fed. 116) that the Commission had acted in substantial compliance with the chal-

lenged statute, that whatever rights of property appellant claimed in respect of the specified lands, or the oysters thereon, *were necessarily based upon the statute itself, and that he could not both assail it and rely upon it in the same proceeding (Kansas City, M. & B. R. Co.* v. *Stiles*, 242 U. S. 111, 117, 61 L. ed. 176, 186, 37 Sup. Ct. Rep. 58). * * * We find no reason to interfere with this decree and it is affirmed." (Italics ours.)

In order to show beyond doubt that plaintiff is in an impossible position and within the rule here under discussion, we now refer to or quote, either in whole or in part, from the record, the following: Plaintiff's petition, parts of the trial proceedings below whereby plaintiff committed himself to a fixed theory, part of the assignments of error, parts of petitioner's brief, the Fourteenth and Fifteenth amendments to the Constitution of the United States, that part of the Oklahoma Constitution invoked by plaintiff, statutory provisions under which plaintiff undertakes his suit, and the Oklahoma provision for the registration of voters.

The petition alleges:

At page 1 of the record:

"* * * that this action involves a federal question, namely, the right of suffrage of plaintiff under the Constitution of the United States, the Fourteenth and Fifteenth Amendments thereto, and the laws of the United States enacted pursuant thereto."

And at page 2 of the record:

"5. That under the laws of the State of Oklahoma (Section 5652, Okla. Stat. 1931), registration is a prerequisite to the right of the citizens of said State to vote in any election held in said state, and unless and until said plaintiff is registered, as provided by

the said laws of Oklahoma, the said plaintiff will not be entitled to vote at any election held in the State of Oklahoma, and in said County and Precinct."

And at page 3 of the record:

"*7.* That such a denial of the right of said plaintiff to vote at said election for said Representatives to the Congress and for said State and County officers, will constitute to plaintiff a denial of the right of suffrage as a citizen of said County and State and of the United States, and will constitute to plaintiff a denial of the equal protection of the laws, contrary to the Constitution and laws of the State of Oklahoma, and contrary to the Constitution of the United States, the Fourteenth and Fifteenth Amendments thereto and to the laws of the United States enacted pursuant thereto."

And at page 4 of the record:

"*11.* That the respective registrars in said County and precincts, during the registration period in May, 1916, and of all subsequent registration periods respectively, informed said plaintiff, that they had no authority or instructions to register any Negroes; and the registrars of said precincts during each and all of said registration periods refused to register any Negroes including this plaintiff, solely on account of their race, color and previous condition of servitude."

At paragraphs 12, 13 and 14 (R. 4-6), the petition alleges a conspiracy upon the part of the defendants to deprive the plaintiff of his right to register and vote.

At paragraphs 15, 16, 17 and 18 (R. 6-7), the petition alleges:

"*15.* That pursuant to the laws of the State of Oklahoma, the registration period for the aforementioned election of November 6, 1934, began on October 17, 1934, and closed on the 26th day of October, 1934.

That on the 24th day of October, 1934, this plaintiff, I. W. Lane, being then a duly qualified elector of said precinct, county and state aforesaid, duly presented himself to the defendant, Marion Parks, precinct registrar aforesaid, and at said time, this said plaintiff made application to said defendant, Marion Parks, for registration and for a registration certificate, which said registration and registration certificate said Marion Parks refused said plaintiff solely on account of the race, color and previous condition of servitude of plaintiff; and at said time said Marion Parks, precinct registrar aforesaid, advised this plaintiff that he had been forbidden by said John Moss, County Judge of Wagoner County, Oklahoma, and by Jess Wilson, County Registrar of Wagoner County, Oklahoma, to register any Negroes.

"*16.* Further, that in refusing to register this plaintiff, as set forth above, and in making it impossible for plaintiff to register and to vote in the aforementioned election, said defendants were acting pursuant to the aforementioned conspiracy; said defendants, and each of them, were and are violating the rights of plaintiff, under the Constitution of Oklahoma, and under the Constitution of the United States, the 14th and 15th amendments thereto, and the laws of the United States enacted pursuant thereto.

"*17.* Further, the illegal acts of the defendants Jess Wilson, John Moss and Marion Parks hereinabove alleged, constitutes a violation of Section 31, Chapter 2 of Title 8 of United States Code (R. S. Sec. 2004). That in the violation of the rights of said plainitff, said defendants, and each of them, were acting under color of certain statutes of the State of Oklahoma hereinafter mentioned, and under color of custom and usage in said County of Wagoner and State of Oklahoma, and caused said plaintiff to be deprived of rights, privileges, and immunities secured by the Constitution and laws of the United States.

"*18.* Further, that in the illegal acts hereinabove complained of, said defendants and each of them were acting under the color of Chapter 29 of the Oklahoma Statutes of 1931, and especially under color of Article 3 of said chapter, and under color of Section 5654 of said Article 3, Chapter 29 of said laws of Oklahoma, 1931, and Section 5657 of said Article and Chapter. That said Section 5654, Article 3, Chapter 29 (C. O. S. 1921, Sec. 6252), provides as follows:"

(Here the petition sets forth, by copy, the vital parts of the Oklahoma registration statutes.)

Paragraph 19 of the petition (R. 9-10) is as follows:

"*19.* Further, plaintiff alleges, upon information and belief, that the above mentioned Section 5654, Okla. Stat. 1931 (C. O. S. 1921, Sec. 6252), and Sec. 5657, Okla. Stat. 1931 (C. O. S. 1921, Sec. 6255) are mere subterfuges aimed exclusively and directly at and against Negro citizens of the United States residing in the State of Oklahoma, and further that said laws are and were designed for the exclusive purpose of depriving said Negro citizens of the right of suffrage, and in violation of Section 6, Article 1 of the Constitution of Oklahoma and also in violation of the 15th Amendment of the Constitution of the United States, and in violation of the laws of the United States enacted pursuant thereto. Said statutes and laws are further an illegal and cunning attempt to achieve the illegal purpose sought by '(The Amendment) Section 4a, Grandfather Clause of Article iii of the Constitution of Oklahoma, and to evade the effect of the decision of the Supreme Court of the United States '*(Guinn* v. *United States'*, decided June 21st, 1915, 238 U. S. 347, 59 L. ed. 1340.) That said State Statutes designated for the purpose aforesaid were enacted on February 26, 1916, immediately after the above mentioned decision of the Supreme Court of the United States; and said laws provide for an unjust, unreasonable and illegal classification of the electors of the United States and of

the State of Oklahoma; they give to precinct registrars therein provided for an arbitrary and capricious discretion to deny or refuse qualified Negro electors the right of suffrage; and said State laws deny and abridge the right of Negro citizens, including this plaintiff, to vote, solely on account of race, color and previous condition of servitude. That precinct registrars of Oklahoma in general in denying the right to register and the right of suffrage throughout said State of Oklahoma, and the defendants hereinabove named in denying and refusing to permit this plaintiff to register or to vote, as hereinabove specified, were and are carrying out the patent and expressed intent and design of said State laws."

At paragraph 20 of the petition (R. 10) plaintiff charges that the alleged conspiracy concocted by defendants, and the illegal acts of the defendants, actually damaged plaintiff in the sum of $5000.00, and that he should recover an additional $5000.00 as punitive damages.

Plaintiff's requested instructions, particularly Nos. 3 and 4 (R. 53-56), asked for charges to the jury that the Oklahoma registration statutes are void, in that said statutes deny the plaintiff due process of law and discriminate between white persons and negroes.

In the Assignments of Error, sections II, III, and IV (R. 79-80), it is alleged that the Oklahoma registration statutes are unconstitutional and void, and that the court erred in holding same constitutional. Said Sec. II is in part as follows:

"* * * and the trial court erred in holding and instructing the jury in said cause that said Registration Laws were valid and not unconstitutional, to all of which plaintiff duly objected and excepted."

Section III of the assignments is as follows:

"It appearing from the face of the Oklahoma Registration Laws of 1916 (O. S. 1931, Sec. 5654), that said law is an attempted revitalization of the illegal Grandfather Clause, Art. III, Sec. 4a, Oklahoma Constitution, Sec. 13450, O. S. 1931; or the same invalid law in a new disguise of words, and having the same discriminatory and unconstitutional intent, operation, and effect, being violative of the 15th Article of Amendment to the Constitution of the United States, the Honorable trial court erred in holding and adjudging, and in instructing the jury in said cause that said laws were and are valid and not unconstitutional, to which plaintiff duly objected and excepted."

Section IV of the assignments reads thus:

"The said Registration Laws of the State of Oklahoma (O. S. 1931, Sec. 5654), as made and enforced by the State, abridge the privileges and immunities of plaintiff Lane and of other citizens of the United States of his color and similarly situated, deprives them of liberty and property without due process of law, and denies them the equal protection of the laws; said Registration Laws are violative of the 14th Article of Amendment to the Constitution of the United States. The trial court erred in holding, adjudging and in instructing the jury upon the trial of said cause that said laws were valid and not violative of the said 14th Amendment."

The following appears in petitioner's brief at page 7:

"In the trial court petitioner Lane, as plaintiff, sought of the defendants Five Thousand Dollars ($5000.00) actual damages and Five Thousand Dollars ($5000.00) punitive damages for and on account of alleged deprivation of his right to register as an elector and, correlatively, of the right to vote, in violation of the Fourteenth and Fifteenth Articles of Amendment to the Constitution of the United States and of Federal laws enacted pursuant thereto, and under color of cer-

tain laws and statutes of the State of Oklahoma, alleged to be unconstitutional and void as violative of said Fourteenth and Fifteenth Amendments."

Commencing at page 42 of petitioner's brief, this language appears:

"*The heart and essence of said registration laws, so far as the present question of constitutionality is concerned, is embodied in Sec. 5654, O. S. 1931, set forth in full in this brief at page 5, and this entire controversy centers around the question whether said Sec. 5654 is unconstitutional, as violating the 14th and 15th Amendments to the Constitution of the United States, and further, whether said section is an unwarranted and unconstitutional* (under the state Constitution) restriction of the qualification of an elector, as provided by Section 1, Article III of the State Constitution." (Italics ours.)

At various other places in the record and in petitioner's brief it appears that what plaintiff is really trying to do is to recover damages for alleged non-compliance upon the part of the precinct registrar with state statutes which plaintiff vigorously alleges to be unconstitutional and void. Throughout the whole proceeding, and with respect to a single cause of action, plaintiff has both asserted that the Oklahoma registration statutes are void, whilst undertaking to rely upon them.

For the convenience of the Court we here copy from the Oklahoma Statutes, 1931, the vital parts of the registration laws, italicizing for emphasis that part of the statutes which the plaintiff contends makes the whole scheme void:

SEC. 5652. "It shall be the duty of every qualified elector in this state to register as an elector under the provisions of this Act, and no elector shall be permitted to vote at any election unless he shall register

as herein provided, and no elector shall be permitted to vote in any primary election of any political party except of the political party of which his registration certificate shows him to be a member."

SEC. 5654. "It shall be the duty of the precinct registrar to register each qualified elector of his election precinct who makes application between the thirtieth day of April, 1916, and the eleventh day of May, 1916, and such person applying shall at the time he applies to register be a qualified elector in such precinct and he shall comply with the provisions of this act, and it shall be the duty of every qualified elector to register within such time; provided, if any elector should be absent from the county of his residence during such period of time, or is prevented by sickness or unavoidable misfortune from registering with the precinct registrar within such time, he may register with such precinct registrar at any time after the tenth day of May, 1916, up to and including the thirtieth day of June, 1916, but the precinct registrar shall register no person under this provision unless he be satisfied that such person was absent from the county or was prevented from registering by sickness or unavoidable misfortune, as hereinbefore provided. *And provided that it shall be the mandatory duty of every precinct registrar to issue registration certificates to every qualified elector who voted at the general election held in this state on the first Tuesday after the first Monday in November, 1914, without the application of said elector for registration, and, to deliver such certificate to such elector if he is still a qualified elector in such precinct and the failure to so register such elector who voted in such election held in November, 1914, shall not preclude or prevent such elector from voting in any election in this state;* and provided further, that wherever any elector is refused registration by any registration officer such action may be reviewed by the District Court of the county by the aggrieved elector by his filing within ten days a pe-

tition with the clerk of said court, whereupon summons shall be issued to said registrar requiring him to answer within ten days, and the District Court shall be a expeditious hearing and from his judgment an appeal will lie at the instance of either party to the Supreme Court of the State as in civil cases; and provided further, that the provisions of this act shall not apply to any school district elections. Provided further, that each county election board in this state shall furnish to each precinct election board in the respective counties a list of the voters who voted at the election in November, 1914, and such list shall be conclusive evidence of the right of such person to vote." (Italics ours.)

Sec. 5657, so far as material here, is this:

"Each qualified elector in this State may be required to make oath that he is a qualified elector in such precinct, and shall answer under oath any questions touching his qualifications as an elector and give under oath the information required to be contained in a registration certificate. *Except in the case of a qualified elector who voted at the general election held in this state on the first Tuesday after the first Monday in November, 1914, in which case it shall be the mandatory duty of the precinct registrar to register such voter and deliver to such voter a registration certificate and the failure to so register such elector and to issue such certificate shall not preclude or prevent such elector from voting at any election in this State.* If any person shall fail or refuse to give the information required in a registration certificate, or fail or refuse to answer any questions propounded to him by said registrar touching his qualifications as an elector, such person shall not be registered and no certificate of registration shall be issued to him. If said registrar shall be satisfied that any person who makes application to register is a qualified elector in the precinct at such time, and if such person complies with all of the pro-

visions of this act, then said registrar shall detach the original registration certificate, properly filled in and containing the information required in this act, and deliver to such person such original registration certificate. * * *" (Italics ours.)

We admit, as claimed by petitioner, that if the above italicized and emphasized parts of sections 5654 and 5657, providing for mandatory registration of those qualified electors who voted in 1914, are void, the whole registration scheme falls. Under our Proposition II authorities upon this point are cited.

This Court is of course familiar with that part of the Fourteenth Amendment to the United States Constitution upon which plaintiff relies, and with the Fifteenth Amendment to the United States Constitution. They here follow, for the convenience of counsel.

Section 1 of the Fourteenth Amendment is in part as follows:

"* * * No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The Fifteenth Amendment is this:

"Section 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.

"Sec. 2. The Congress shall have power to enforce this article by appropriate legislation."

In furtherance of Sec. 2 of the Fifteenth Amendment, the Congress enacted Sec. 1979 of the Revised Statutes (Sec. 43, Title 8, U. S. Code Annotated), which is as follows:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

The above is the section under which plaintiff sues. It gives a right of action against officers for enforcing a void statute and thereby depriving one of a right *under color of a void law.* It has no application except where the action is based upon a wrong by an officer committed in the course of the enforcement and in the pursuance of a void state statute. In *Myers* v. *Anderson*, 238 U. S. 366, 59 L. ed. 1349, this Court held that "the enforcement of a state law is of itself the wrong which gives rise to the cause of action". This Sec. 1979 applies in an election case only when a void state law commands the election officials to deprive an elector of his right to vote. It was doubtless enacted primarily for the purpose of foreclosing officials from a complete defense by showing good faith and want of malice. Independent of statutory authority, all persons have the common-law right of action for deprivation of rights guaranteed by the Constitution. In a common-law action for deprivation of constitutional rights in the course of administration of void statutes, good faith and want of malice is a defense. Under Sec. 1979 officers are held bound to know the law, and they are required to disregard void statutes. In the instant case the defendant registrar was required to disregard and not act under the registration statutes, if they are void.

Plaintiff seems to rely somewhat upon Sec. 2004 of the

Revised Statutes (Sec. 31, Title 8, U. S. Code Annotated), which is as follows:

> "All citizens of the United States who are otherwise qualified by law to vote at any election by the people in any State, Territory, district, county, city, parish, township, school district, municipality, or other territorial subdivision, shall be entitled and allowed to vote at all such elections, without distinction of race, color, or previous condition of servitude; any constitution, law, custom, usage, or regulation of any State or Territory, or by or under its authority, to the contrary notwithstanding."

This section does not provide any right of action. It merely declares a substantive right theretofore existing. It does not in itself provide any remedy for the infringement of a declared right, and hence it is without importance in this case.

In brief summary, plaintiff's case is this: He claims the right of registration under statutes alleged to be void. He asserts that the registration laws of Oklahoma are void, and in the same proceeding and in a single cause of action, he claims damages because the defendant registrar did not add plaintiff's name to the registration lists, asserted to be void. He asks for that which Justice HOLMES in *Giles* v. *Harris, supra,* called *a naked declaration in the air.* Under this proposition we are asking *that this Court do precisely what it did in Giles* v. *Harris,* and hold the plaintiff to his own theory and deny him any relief, because he cannot both assert the invalidity of the statutes in question, and sue in damages for non-compliance with the alleged void registration statutes.

The petitioner undertakes to meet the contention above made by invoking *Myers* v. *Anderson,* 238 U. S. 368, 59 L. ed. 1349. We shall show hereinafter that *Myers* v. *An-*

derson was an entirely different case from that here presented. Plaintiffs there sued the officials who held an election at which the plaintiffs were entitled to vote, and were wrongfully denied the right of suffrage. But here the principal defendant was a mere registration officer, with no duties to perform on any election date. Beside, by plaintiff's own theory, which is that the Oklahoma Registration Law is void, plaintiff had the right to vote without registration. *If plaintiff's theory is correct and if he applied for registration in 1916, he should have presented himself at the polls and there demanded the right of suffrage. Had he done so, and had the officials at the polls denied his right to vote, then he would have had a right of action against the election officials who prevented his voting, if the Registration Law is void.* In the petitioner's brief an effort is made to anticipate this argument by saying that Oklahoma has a criminal statute forbidding an unregistered person to vote or offer to vote at an election. If the Registration Law is void, it is manifest that this statute is void and inoperative. *We think it safe to say that there is no reported case sustaining the view that a registration officer may be sued in damages for failure to register an applicant under a void Registration Law, and we submit that this view is utterly absurd.*

The case of *Nixon* v. *Herndon*, 273 U. S. 537, 71 L. ed. 759, cited by petitioner, likewise fails to support him. There the action was against the judges officiating at the polls, for wrongfully refusing the right of suffrage. If the Oklahoma Registration Law is void, it must be conceded that if the defendant Registrar had registered the plaintiff, Lane, the act of registration and the certificate in evidence thereof would have had no force or effect whatsoever. *The defendant Registrar is sued, according to the plaintiff's own theory, for failure to do a vain thing.* The defendants

other than Parks are sued as alleged conspirators conspiring with Parks to prevent the registration of Lane and other negroes. *Plaintiff's pretended case, and the theory presented in support thereof, are not only without precedent in the reported cases, but without any support in reason.*

It seems apparent that there is no federal question here presented for decision. The federal courts should not have assumed jurisdiction of the case, since no cause of action is stated necessarily involving a federal question. The rule that a federal court cannot pass upon a constitutional question unless presented in a justiciable controversy is too well known to require citation of authority. The plaintiff has failed to state a justiciable controversy such as to require decision of this Court upon the constitutional questions sought to be presented.

II.

Myers v. Anderson, 238 U. S. 368, 59 L. ed. 1349, upon which plaintiff relies, does not support the contention that plaintiff can proceed against the registration officer. In fact, the doctrine announced in _Myers v. Anderson_ affirmatively supports the contention that plaintiff cannot sue the registration officer in this case.

For these further and additional reasons plaintiff has not stated or made a case.

Myers v. *Anderson*, in no way supports the plaintiff upon the point. The case arose in Maryland and was prosecuted successfully against a registrar. In 1896 the Maryland Legislature enacted a valid general election law applicable to all parts of the state, and to every precinct thereof, and every qualified elector. Under this general valid registration law every qualified elector had to register, and none could vote without registration. Later, in 1908, a special

act was passed by the Legislature to fix the qualifications of voters at municipal elections in the City of Annapolis, and to provide for the registration of said voters in the city. The defendant registrar, acting under this special act, refused plaintiff registration. The suit was brought against the registration officer for denial of the right of registration. The action was sustained, because of said refusal. The void act of 1908 purported to require the registrar defendant to refuse the plaintiff registration. The denial was solely because of the terms of the void 1908 act. *When the 1908 act was stricken down there still remained the valid prior act of 1896, which made registration necessary to vote.* The situation, in brief, was this: *The registration officer should have registered the plaintiff under the still existing valid law of 1896, and should have disregarded the void law of 1908.* The situation here is wholly unlike that. In referring to the 1896 valid registration law this Court said:

> "In 1896 a general election law comprising many sections was enacted in Maryland. Laws of 1896, Chap. 202, p. 327. It is sufficient to say that it provided for a board of supervisors of elections in each county to be appointed by the governor, and that this board was given the power to appoint two persons as registering officers and two as judges of election for each election precinct or ward in the county. Under this law each ward or voting precinct in Annapolis became entitled to two registering officers."

After holding void the special act of 1908 applicable to Annapolis, this Court proceeded to make it clear that the defendant registrar should have registered the plaintiff under the still existing and valid act of 1896, saying:

> "*The qualification of voters under the Constitution of Maryland existed and the statute which previously provided for the registration and election in Annapolis was unaffected by the void provisions of the statute*

which we are considering. The mere change in some respects of the administrative machinery by the new statute did not relieve the new officers of their duty, nor did it interpose a shield to prevent the operation upon them of the provisions of the Constitution of the United States and the statutes passed in pursuance thereof." (Italics ours.)

Thus having held that the plaintiff was entitled to registration under the 1896 act, that the defendant registrar should have registered him, and that by denial of his right of registration the plaintiff had been deprived of the right to vote, this Court concluded that the defendant registrar was properly sued. But here what the plaintiff Lane is really saying is that the Oklahoma registration law was utterly void, that there was no provision whatever for registering the plaintiff in 1934, *and that notwithstanding the absence of any statutory requirement for plaintiff's registration, he is entitled to sue the defendant registrar in damages for failure of registration.* Thus plaintiff reduces his claim to absurdity absolute.

We concede the contention of petitioner that if the statutory provisions making it mandatory to register in 1916 all qualified electors who had voted in the 1914 general election are void, the whole of the state registration scheme is void, for the reasons set forth in *Myers* v. *Anderson*, and upon the grounds named by Judge COOLEY, to which reference will be made directly.

In *Myers* v. *Anderson* this Court, having held that one of the standards set up by the Annapolis registration law was void, then considered whether or not the whole of the act would be overthrown. The discussion upon the point is as follows:

"In the *Guinn* case this subject was also passed upon and it was held that albeit the decision of the

question was, in the very nature of things a state one, nevertheless, in the absence of controlling state rulings, it was our duty to pass upon the subject and that in doing so the overthrow of an illegal standard would not give rise to the destruction of a legal one unless such result was compelled by one or both of the following conditions: *(a)* Where the provision as a whole plainly and expressly established the dependency of the one standard upon the other, and therefore rendered it necessary to conclude that both must disappear as the result of the destruction of either; and *(b)* where, even although there was no express ground for reaching the conclusion just stated, nevertheless that view might result from an overwhelming implication consequent upon the condition which would be created by holding that the disappearance of the one did not prevent the survival of the other; that is, a condition which would be so unusual, so extreme, so incongruous as to leave no possible ground for the conclusion that the death of the one had not also carried with it the cessation of the life of the other.

"That both of these exceptions here obtain we think is clear."

In Cooley's Constitutional Limitations, Sixth Edition, commencing at page 209, under the caption "Statutes Unconstitutional in Part", the author said:

"It will sometimes be found that an act of the legislature is opposed in some of its provisions to the constitution, while others, standing by themselves, would be unobjectionable. So the forms observed in passing it may be sufficient for some of the purposes sought to be accomplished by it, but insufficient for others. In any such case the portion which conflicts with the constitution, or in regard to which the necessary conditions have not been observed, must be treated as a nullity. Whether the other parts of the statute must also be adjudged void because of the as-

sociation must depend upon a consideration of the object of the law, and in what manner and to what extent the unconstitutional portion affects the remainder. A statute, it has been said, is judicially held to be unconstitutional, because it is not within the scope of legislative authority; it may either propose to accomplish something prohibited by the constitution, or to accomplish some lawful, and even laudable object, by means repugnant to the Constitution of the United States or of the State. A statute may contain some such provisions, and yet the same act, having received the sanction of all branches of the legislature, and being in the form of law, may contain other useful and salutary provisions, not obnoxious to any just constitutional exception. It would be inconsistent with all just principles of constitutional law to adjudge these enactments void because they are associated in the same act, but not connected with or dependent on others which are unconstitutional. Where, therefore, a part of a statute is unconstitutional, that fact does not authorize the courts to declare the remainder void also, unless all the provisions are connected in subject-matter, depending on each other, operating together for the same purpose, or otherwise so connected together in meaning, that it cannot be presumed the legislature would have passed the one without the other. The constitutional and unconstitutional provisions may even be contained in the same section, and yet be perfectly distinct and separable, so that the first may stand though the last fall. The point is not whether they are contained in the same section; for the distribution into sections is purely artificial; *but whether they are essentially and inseparably connected in substance. If, when the unconstitutional portion is stricken out, that which remains complete in itself, and capable of being executed in accordance with the apparent legislative intent, wholly independent of that which was rejected, it must be sustained.* The difficulty is in determining whether the good and bad parts of the statute are cap-

able of being separated within the meaning of this rule. If a statute attempts to accomplish two or more objects, and is void as to one, it may still be in every respect complete and valid as to the other. *But if its purpose is to accomplish a single object only, and some of its provisions are void, the whole must fail unless sufficient remains to effect the object without the aid of the invalid portion. And if they are so mutually connected* with and dependent on each other, as conditions, considerations, or compensations for each other, *as to warrant the belief that the legislature intended them as a whole, and if all could not be carried into effect the legislature would not pass the residue independently, then if some parts are unconstitutional, all the provisions which are thus dependent, conditioned, or connected must fall with them.*" (Italics ours.)

III.

Regardless of whether or not the registration law of Oklahoma is valid; and if valid, regardless of whether or not it was properly administered, it cannot be held that plaintiff sustained any actionable injury or that he was denied any constitutional right.

First. Let it be assumed solely and only for the purpose of argument that the Registration Statutes of Oklahoma are void: If the Registration Statutes are void, there was no authority for anybody to register the plaintiff at any time. According to plaintiff's own theory, Parks is sued for failure to do that which he had no authority to do. Plaintiff claims damages for want of a registration certificate, whilst contending in fact that if he had such certificate the same would be utterly void.

Second. Take the Oklahoma Registration Law as valid: It is manifest that plaintiff cannot recover for three reasons; namely: *(1)* Because under the Oklahoma Registra-

tion Law there is no provision by which Parks, as registration officer in 1934, could register the plaintiff, Lane, or any person similarly situated. This will fully appear hereinafter. *(2)* Because Lane did not apply to the precinct registrar of his precinct in 1916, during the period for general and permanent registration throughout the State, and the plaintiff did not undertake to bring himself within any of the exceptions provided by the Registration Law for registration of then qualified voters at a date, or dates subsequent to the 1916 registration. Plaintiff's own evidence shows this to be true. Lane and his supporting witnesses claimed that in 1916 he applied for registration to one Workman, who was not precinct registrar until 1920. The public records of Wagoner County, Oklahoma, where the plaintiff, Lane, lives, and where the alleged cause of action arose, show that one Pace was the registrar in 1916, rather than Workman. The Circuit Court of Appeals found Lane failed to apply, as he should have done, in 1916, for registration. The evidence upon these points will be discussed later. *(3)* There is a further insuperable barrier against recovery, because if, in fact, Lane did apply in 1916 for permanent registration, which was the proper time for his application, and was denied registration, he had to appeal from the registrar's adverse decision through the courts, as provided by the Registration Statutes. He did not appeal.

IV.

Plaintiff was required to apply for registration in 1916. Let us here assume, for the sake of argument, that he did in fact, as alleged, make proper application in 1916, and that same was wrongfully denied, and for the purpose of argument only, bar from consideration the rule already discussed under our Proposition I, that a plaintiff cannot in the same proceeding both assert the invalidity of statutes and rely upon them; still the plaintiff cannot recover, because he did not appeal from the wrongful decision, and thereby failed to exhaust his remedies provided by the Registration Statutes. For this additional reason the plaintiff has failed to state or make a case.

Sec. 5654, O. S. 1931, provides for appeal from an adverse holding by a registrar, as follows:

> "* * * and provided further, that wherever any elector is refused registration by any registration officer such action may be reviewed by the District Court of the county by the aggrieved elector by his filing within ten days a petition with the clerk of said court, whereupon summons shall be issued to said registrar requiring him to answer within ten days, and the District Court shall be a expeditious hearing and from his judgment an appeal will lie at the instance of either party to the Supreme Court of the State as in civil cases; * * *"

It is admitted that plaintiff made no effort to appeal. Plaintiff further admits that prior to his application for registration in 1934 he had been duly advised of this remedy. The plaintiff Lane and others had prosecuted an action in the United States District Court for the Eastern District of Oklahoma before Judge Robert L. Williams, for failure of registration. The plaintiff Lane was then upon the witness stand. The question was under consideration as to

how Lane and others similarly situated could be registered. Judge Williams pointed out to Lane and the other complaining parties there present and participating in the trial that in cases where qualified electors applied to a precinct registrar for registration, and were wrongfully denied, their remedy was by appeal, and Judge Williams at that time read to Lane and the other parties to the action the foregoing statutory provision authorizing appeal (R. 30). It is admitted, therefore, that the failure of the plaintiff to appeal in 1934 was deliberate, with full knowledge of the right of appeal. He undertakes to explain his failure to appeal to the state District Court, saying that he chose to "appeal" by this original action (R. 30).

This precise question was involved in *Trudeau* v. *Barnes*, 1 Fed. Sup. 453, 65 Fed. (2d) 563 (5th Circuit), 290 U. S. 659, 78 L. ed. 571, and it was there held that a qualified elector cannot sue for damages if he failed to exhaust his statutory remedies by appeal from the adverse ruling of a registration officer. The method of appeal was the same as that here involved. The action for damages, just as in the instant case, was brought under Sec. 1979 of the Revised Statutes (8 U. S. C. A., Sec. 43). An extended statement of the case is found in the decision of the lower court, 1 Fed. Sup. 453. It is there stated by Judge Borah:

> "This is an action at law brought pursuant to the provisions of title 8 U. S. C. A., Sec. 43, wherein the plaintiff, Antoine M. Trudeau, a colored man and a member of the Negro race, is seeking to recover damages against Charles S. Barnes, registrar of voters for the parish of Orleans, for alleged deprivation of the civil right to register as a voter in elections.
>
> "The petition is divided into two alternative causes of action, both having as their bases the same alleged state of facts. Pretermitting the arguments of law and conclusions to which the petition is largely

devoted, the pertinent allegations of fact are that on June 18, 1931, Trudeau applied for registration, and was furnished with a registration blank form, and was requested to fill it out in his own writing with his name, place and date of birth, age, ward, residence, and all other data required thereon; that he duly and correctly filled out all the blanks on the said form in his own handwriting, and returned the form to the said Charles S. Barnes, registrar, who then demanded that petitioner read the paragraph from section 1, article 8 of the Constitution of the State of Louisiana containing the understanding clause which is as follows: 'Said applicant shall also be able to read any clause in this Constitution, or the Constitution of the United States, and give a reasonable interpretation thereof'; and that he explain the meaning of the paragraph; that 'petitioner correctly read the said section, and sought to explain its meaning, but the said Charles S. Barnes arbitrarily declared that your petitioner had not perfectly understood and explained the meaning thereof, and refused your petitioner the right to register'."

The plaintiff was denied the right to maintain his action in damages because he had a plain and adequate remedy by appeal. In the course of his opinion the trial judge stated:

"The plaintiff rests his case entirely on two decisions of the United States Supreme Court: *Guinn & Beal* v. *United States*, 238 U. S. 347, 35 S. Ct. 926, 931, 59 L. ed. 1340, L. R. A. 1916A, 1124; *Myers* v. *Anderson*, 238 U. S. 368, 35 S. Ct. 932, 935, 59 L. ed. 1349. *But he evidently misinterprets these decisions, for they are clearly distinguishable from the case at bar, in that the state laws therein involved were openly and on their face discriminatory*, and were held to be unconstitutional, not on account of their provisions as to educational qualifications, but on account of the presence therein of so-called 'grandfather clauses';

that is, clauses which make the right to vote dependent on conditions existing at a date prior to the adoption of the Fifteenth Amendment." (Italics ours.)

The decision then makes the point that the ruling of the precinct registrar was "subject to control by review", and that plaintiff could not be heard to complain in an action for damages, on account of his failure to appeal.

Upon appeal to the Fifth Circuit, 65 Fed. (2d) 563, it was held that one denied registration as a voter, before suing for damages under federal statute, must exhaust the remedy afforded by the state law. Referring to provision for appeal, the Circuit Court said:

"The same article in section 5 provides that any person possessing the qualifications for voting who may be denied registration shall have the right to apply for relief to the District Court for the parish in which he offers to register; that the court shall then try the cause, giving it preference over all other cases, before a jury whose verdict shall be final, except that the complaining party is given the right of appeal to the appropriate appellate court."

In its application of the state law authorizing appeal, and in denying the claim of plaintiff for damages, the Circuit Court announced the familiar rule that one cannot sue for damages without first having fully exhausted the remedies provided by law, saying.

"The Louisiana Constitution protects every citizen who desires to register from being arbitrarily denied that right by the registrar of voters by giving the applicant a right to apply without delay and without expense to himself to the trial court for relief, to submit his qualifications to vote to a jury, and to have them finally passed upon by an appellate court. It is idle to say that the defendant as registrar had the arbitrary power to deny plaintiff the right to vote.

> We cannot say, and refuse to assume, that, if the plaintiff had pursued the administrative remedy that was open to him, he would not have received any relief to which he was entitled. *At any rate, before going into court to sue for damages he was bound to exhaust the remedy afforded him by the Louisiana Constitution. First National Bank of Greeley, Colo.* v. *Weld County*, 264 U. S. 450, 44 S. Ct. 385, 68 L. ed. 784; *First National Bank* v. *Gildart* (C. C. A.), 64 F. (2d) 873, Fifth Circuit, decided April 22, 1933." (Italics ours.)

Trudeau applied to this Court for review of his case. On Novembed 6, 1933, certiorari was denied. 290 U. S. 659, 78 L. ed. 571.

This appears to be the only federal case reported involving this question with respect to the effect of failure to appeal from the decision of a registrar. An examination of the cases cited *supra* by the Circuit Court shows that the general rule applied in cases of failure to exhaust one's statutory remedies by appeal governs in election matters.

In *First Nat. Bank* v. *Board of Commrs.*, 264 U. S. 450, 68 L. ed. 784, the first case cited *supra* as supporting the rule announced in *Trudeau* v. *Barnes*, a taxpayer had failed to exhaust the remedies provided for appeal. With respect to such situation this Court said:

> "We are met at the threshold of our consideration of the case with the contention that the plaintiff did not exhaust its remedies before the administrative boards, and consequently cannot be heard by a judicial tribunal to assert the invalidity of the tax. We are of opinion that this contention must be upheld."

Then this Court referred to a Colorado decision, in which state the action arose, saying:

"The Supreme Court of Colorado, in a suit brought by this plaintiff against the county assessor, involving the same tax for 1913, and presenting the same questions here involved, sustained the refusal of a lower court to enjoin the collection of the tax, and held: * * * and (d), 'with full knowledge of the respective powers of these several boards to make corrections in assessments and adjustments in equalization, essential to bring about a complete and equitable assessment of all property within the state, it remained inactive until long after the tax was laid, when it applied for an abatement or rebate of the tax. The aforesaid tribunals were open to plaintiff in error prior to the laying of the tax, but it refrained from seeking relief therein, and may not now complain.' *First Nat. Bank* v. *Patterson*, 65 Colo. 166, 172, 173, 176 Pac. 498.

"*The effect of this is to hold that an administrative remedy was in fact open to plaintiff under the statutes of the state, and by this construction, upon well-settled principles, we are bound.* *McGregor* v. *Hogan*, decided November 12, 1923, 263 U. S. 234, *ante*, 282, 44 Sup. Ct. Rep. 50; *Farncomb* v. *Denver*, 252 U. S. 7, 10, 64 L. ed. 424, 426, 40 Sup. Ct. Rep. 271; *Londoner* v. *Denver*, 210 U. S. 373, 374, 52 L. ed. 1103, 1107, 28 Sup. Ct. Rep. 708; *Price* v. *Illinois*, 238 U. S. 446, 451, 59 L. ed. 1400, 1404, 35 Sup. Ct. Rep. 892; *Western U. Teleg. Co.* v. *Missouri*, 190 U. S. 412, 425, 47 L. ed. 1116, 1121, 23 Sup. Ct. 730.

* * * * * * *

"we cannot assume that, if application had been made to the commission proper relief would not have been accorded by that body, in view of its statutory authority to receive complaints and examine into all cases where it is alleged that property has been fraudulently, improperly, or unfairly assessed. *Collins* v. *Keokuk*, 118 Iowa 30, 35, 91 N. W. 791. Nor will plaintiff be heard to say that there was not adequate time for a hearing, in the absence of any effort on its part to obtain one. * *." And, accepting the decision of the

state court that such remedies were, in fact, open and available under the Colorado statutes, it could not be dispensed with. *McGregor* v. *Hogan, supra; Farncomb* v. *Denver,* 252 U. S. 11, 64 L. ed. 426, 40 Sup. Ct. Rep. 271; *Stanley* v. *Albany County,* 121 U. S. 535, 30 L. ed. 1000, 7 Sup. Ct. Rep. 1234; *Petoskey Gas Co.* v. *Petosky,* 162 Mich. 447, 452, 127 N. W. 345; *Caledonia Twp.* v. *Rose,* 94 Mich. 216, 218, 53 N. W. 927; *Hinds* v. *Belvidere Twp.,* 107 Mich. 664, 667, 65 N. W. 544; *Ward* v. *Alsup,* 100 Tenn. 619, 746, 46 S. W. 573.

"Plaintiff not having availed itself of the administrative remedies afforded by the statutes, as construed by the state court, *it results that the question whether the tax is vulnerable to the challenge in respect of its validity upon any or all of the grounds set forth, is one which we are not called upon to consider.*" (Italics ours.)

The consideration given to the Colorado case in one of the excerpts set forth above invites attention to authoritative statements in Oklahoma with respect to the Oklahoma law authorizing appeal from adverse decisions of registration officers.

In *Determan* v. *State,* 89 Okl. 242, 244, it was said:

"In that event, if registration is refused on any ground, the whole of section 6252, providing the general regulations for registering, including the provision providing for appeal, is the governing section."

On April 1, 1922, the Attorney General of the State in a written opinion held, in accordance with the well established practice in Oklahoma:

"If registrar wrongfully, arbitrarily or capriciously refuses to issue a registration certificate to an elector, qualified under the law to receive it, the elector is given his remedy by an appeal to the District Court of the county in which he resides."

This opinion of the Attorney General is found in the booklet printed by the authority of the State Election Board in 1932, at page 9.

The rule requiring one to exhaust his available statutory remedies before resort to court action appears to be uniform and applicable to all sorts of cases.

At the first trial Judge Williams directed a verdict in favor of the defendants, relying upon *Trudeau* v. *Barnes* and other authorities to the same effect. A new trial was granted because plaintiff claimed that Judge Williams was disqualified, and he reached the conclusion that in view of his challenge he should not enter judgment against plaintiff. Judge Murrah likewise directed a verdict in favor of the defendants, as shown by his opinion, relying principally upon the doctrine in *Trudeau* v. *Barnes* and in the cases there cited.

Commencing at page 48 of petitioner's brief, he seeks to distinguish and escape the application of the *Trudeau-Barnes* case, *supra,* and the cases therein cited, by placing the present case in the same class as the *Guinn* and *Myers-Anderson* cases. But this case cannot be so classified, because, as has been pointed out, the *Guinn* and *Myers-Anderson* cases involve provisions which *were void and discriminatory on their faces,* whereas the Oklahoma Registration Law of 1916 is not void or discriminatory on its face, nor has petitioner ever so contended. And as is hereinafter shown, said law of 1916 does not embody the objectionable "Grandfather Clause" found in the *Guinn* case. It is only in cases where the law involved is void and discriminatory on its face, that the person complaining thereof is excused from seeking remedy by the appeal provided. *Trudeau* v. *Barnes, supra,* and cases therein cited.

Bearing in mind the fact that plaintiff's action is upon

the ground that he was not registered, it is definitely certain that he cannot recover, having failed to appeal and thereby comply with the statutory provisions which provide a ready and ample method for review in any case where registration is wrongfully denied.

V.

The defendant registrar Parks had no authority to register the plaintiff in 1934. The statutes (Sec. 5654) limited his authority to register *(1)* those who subsequent to the next prior registration period had become qualified to vote in the precinct, and *(2)* those qualified electors who theretofore had not been registered because of absence, sickness, or other unavoidable misfortune. Plaintiff Lane does not claim to belong to either of these classes. For this further and additional reason plaintiff has failed to state or make a case.

A careful examination of the statutes, particularly said Sec. 5654, will disclose that there was no provision whatever authorizing or directing the registrar Parks to register any applicants other than those who belonged to one of the two classes above mentioned. The first and only registration laws ever enacted in Oklahoma are those under attack. The scheme, in brief, was this: All qualified electors of each precinct had to be registered between the 30th day of April, 1916, and the 11th day of May, 1916, unless prevented by absence, sickness, or unavoidable misfortune. If so prevented, electors were given the right to be registered at the next registration period. Provision was made for opening the registration books for further registration at fixed periods from time to time prior to each general election. There is not so much as a word in the law showing or tending to show that the defendant Parks had

any authority whatsoever to register Lane in 1934, the date of his alleged denial of the right of registration. There was no duty upon the part of Parks, in this absence of statutory authority, to register Lane. In fact section 5654 contains a positive inhibition against registration in 1934 of one in Lane's situation. This point alone seems conclusive of the whole matter in favor of the defendants.

VI.

It conclusively appears that in fact plaintiff Lane never applied for registration to the 1916 precinct registrar. It was so held by the Circuit Court of Appeals (R. 100). There is no proof that the 1916 registrar in the precinct where plaintiff lived ever refused registration of any colored voter who applied to him. There is no evidence that any colored voter in Wagoner County was ever wrongfully denied registration, upon proper application.

The 1916 registration of the voters throughout the state was the first made. By reference to the statutes it will be observed that the plan was to make a *permanent* registration of all qualified voters. The law, applicable to all persons alike, does not provide for subsequent registration of the then qualified voters, except those who could not register in 1916 on account of absence, sickness, or other unavoidable misfortune.

For some reason not appearing in the record Lane failed to apply in 1916 for registration upon the permanent list of voters. It is true he says he applied in 1916 and at all registration periods subsequent thereto. But his own story is that in 1916 he applied to Workman, who was not registrar until 1920. In 1916 the registrar in plaintiff's precinct where he was required to register was James L. Pace, and no other person. Pace had the records and

performed his duties as registrar throughout both of the 1916 registration periods which came before the primary and general elections of that year. The evidence upon this point (R. 28-52) follows:

Lane testified that he applied for registration in 1916 to a man named Workman (R. 28) and, over defendant's objection and exception made upon the ground that the question did not call for the best evidence, testified that Workman was the 1916 precinct registrar. There was no documentary evidence available from the public records of the county as to who was in fact the 1916 registrar in the precinct, except the registration record of the county, page 71 of which was introduced in evidence by plaintiff (R. 34) and it was there found that said public registration record contained the names of all the precinct electors registered in 1916, which list was made in the proper registration periods of 1916, *and by Pace*, rather than Workman (R. 34, *et seq.*).

In the absence of an available public record of the county showing the appointment of the precinct registrar for 1916, there was introduced the Wagoner County Democrat, a newspaper published at Wagoner, the county seat of Wagoner County, the same being the issue of April 27, 1916, wherein appeared a list of the precinct registration officers under appointment made by the county registrar. This published list shows that Pace was the 1916 registrar in Gatesville Precinct #1, where the plaintiff lived and was required to register (R. 45). Various original registration certificates in the hands of voters of the precinct were introduced, all issued by Pace (R. 40, *et seq.*). Surely it requires no argument to show that documentary evidence made at the time, particularly the public record of the county made by proper authority, is the best evidence to prove who was the 1916 precinct registrar.

Pace, the 1916 registrar, testified, identifying the authoritative and public registration lists made by himself for both of the registration periods in 1916, selecting names of voters whom he recalled registering in both of the registration periods for that year, and further testifying that he served for those periods.

Plaintiff Lane admitted that he did not apply to Pace for registration. Thus it affirmatively appears from plaintiff's own admissions, from the county's public records of the voters registered in 1916, and from all the available documentary evidence made at the very time of the registration, that Workman, to whom Lane says he went for registration, was not the registrar for that year. It does appear, however, that Workman was the registrar in that precinct in 1920.

There is not the slightest evidence that the 1916 registrar ever refused registration to any elector whomsoever, whether white or colored. As to the alleged wrongful refusal to register negroes throughout the county, it should be noted that there is no evidence that at any time in Wagoner County any proper application for registration of a qualified colored voter was refused. It is not for us to seek the reason why the great body of colored electors in the county did not apply for registration in 1916. The emotional appeals in petitioner's brief describing the alleged wrongs upon colored persons throughout the county are without basis in fact appearing in the record. Perhaps there are intimations in the record as to the reason why so many negroes entitled to registration in Wagoner County failed of registration. If required to say how this condition was brought about, we would have to assume that wrong advice was given to the great majority of the colored people of Wagoner County, to the effect that they should ignore the provisions of the registration laws, upon

the theory that they are void, as here contended by plaintiff.

It has been already pointed out that Lane himself declined to take good advice when given by high authority. In this connection it should be borne in mind that whilst the plaintiff Lane was on the witness stand before Judge Williams, the then United States Judge for the Eastern District of Oklahoma, in an action involving Lane's failure and that of others to be registered, Judge Williams himself pointed out to Lane the statutory requirement for appeal in case of refusal by a registration officer to register an applicant; that thereafter Lane appeared before Parks, the principal defendant here, and having been denied registration, instituted this original action, wholly disregarding the advice which he had received from a Federal judge. If that sort of spirit has prevailed among the colored people of Wagoner County, we have an explanation of the fact that not many colored persons in Wagoner County are registered.

VII.

There was no proof of conspiracy upon the part of the defendants or any of them, to deny negroes the right of registration. The Circuit Court of Appeals so held (R. 100).

The gist of the testimony of plaintiff's witnesses is to the effect that Parks declined to register Lane, giving as the reason that he had been advised by the "higher ups", the defendants Moss and Wilson, not to register colored people.

As to the defendant Moss: There was only pure hearsay, to which the defendants objected and excepted, tending to connect Moss with this statement alleged to have been made by Parks. If Parks did make the statement that he was instructed by Moss not to register colored people, it is not binding upon Moss, no other evidence appearing to connect Moss with the alleged wrongdoing of Parks.

As to the defendant Wilson: He is in the same situation as the defendant Moss, and for the same reason there is nothing of record so connecting him with Parks as to justify the charge of conspiracy.

We are therefore brought to consider Parks alone, who followed, in the case of Lane, the plain provisions of the applicable statutes denying Lane registration because he did not belong to any one of the classes whom Parks was authorized to register at that time. There is no evidence that in 1934 any white person in the state was ever registered in similar circumstances. Those who failed to have their names placed upon the permanent registration lists of 1916, whether white or colored, have been treated alike, so far as the record shows.

VIII.

The Oklahoma Registration Statutes do not violate any of the constitutional provisions invoked by plaintiff. They cannot be overthrown by any or all the applicable rules for interpretation.

No resort can be had to administrative results or other extraneous matters, for the statutes are not ambiguous or of doubtful meaning.

The challenge for alleged discrimination is not sustainable. The sole test of the constitutionality of the alleged discriminatory provisions is this: Were those who did not vote in 1914 subjected in 1916 to the same standard of qualification as to the right to vote, as those who had voted in 1914?

(a) ***Statutes which are clear and unambiguous, as in the instant case, when challenged upon constitutional grounds, must be tested from the statutory provisions themselves, unaided by extraneous facts with respect to the manner in which they have been administered. Such extraneous matters are resorted to for the sole purpose of determining the intent of the Legislature, where the intent is left doubtful upon the face of the statutes. Petitioner's contention that the Oklahoma Registration Statutes violate constitutional provisions because the evidence here shows that actual administration under the statutes achieved a result contrary to constitutional provisions, is not supported by authorities cited upon the point. These cases are here examined and distinguished.***

The true rule upon this point is stated in Cooley's Constitutional Limitations, 6th Ed., at pages 79-80, thus:

> "The considerations thus far suggested are such as have no regard to extrinsic circumstances, but are those by the aid of which we seek to arrive at the meaning of the constitution from an examination of

the words employed. *It is possible, however, that after we shall have made use of all the lights which the instrument itself affords, there may still be doubts to clear up and ambiguities to explain. Then, and only then, are we warranted in seeking elsewhere for aid. We are not to import difficulties into a constitution, by a consideration of extrinsic facts, when none appear upon its face. If, however, a difficulty really exists, which an examination of every part of the instrument does not enable us to remove, there are certain extrinsic aids which may be resorted to, and which are more or less satisfactory in the light they afford.*" (Italics ours.)

And at pages 84-85:

"*Where, however, no ambiguity or doubt appears in the law, we think the same rule obtains here as in other cases, that the court should confine its attention to the law, and not allow extrinsic circumstances to introduce a difficulty where the language is plain.* To allow force to a practical construction in such a case would be to suffer manifest perversions to defeat the evident purpose of the lawmakers. 'Contemporary construction * * * can never abrogate the text; it can never fritter away its obvious sense; it can never narrow down its true limitations; it can never enlarge its natural boundaries.' While we conceive this to be the true and only safe rule, we shall be obliged to confess that some of the cases appear, *on first reading*, not to have observed these limitations." (Italics ours.)

The author then refers to authority which appears upon first reading to announce a contrary rule, and then, with respect to this *apparent contra*, states at page 85:

"It is believed, however, that in each of these cases an examination of the Constitution *left in the minds of the judges sufficient doubt upon the question of its violation to warrant their looking elsewhere for aids in interpretation*, and that *the cases are not in*

conflict with the general rule as above laid down." (Italics ours.)

In *Moore* v. *Otis* (8th Cir.), 275 Fed. 747, the rule for which we contend was announced thus:

> "In this connection it is proper to say that the constitutional validity of a law has to be tested not by what has been done under it but what may by its authority be done. *Montana Co.* v. *St. Louis, etc. Co.*, 152 U. S. 170, 14 Sup. Ct. 506, 38 L. ed. 398. One public official may construe the law a certain way and another in a different way, *but the courts only look to what may be done by any public official under a fair construction of the law.*" (Italics ours.)

In *Montana Co.* v. *St. Louis Mining Co.*, 152 U. S. 160, 38 L. ed. 398, this Court put this question at rest by expressly approving a New York case, from which this Court copied and approved this statement of the rule: "'The constitutional *validity of law is to be tested, not by what has been done under it, but by what may by its authority, be done*'", saying, however, as was said by the Eighth Circuit, quoted *supra*, that the courts will look only to what may be done by the public officials under a fair construction of the law.

In *Grainger* v. *Douglas* (Sixth Circuit), 148 Fed. 513, this question was under consideration. The judges of the Sixth Circuit considered the *Yick Wo* case from California, which is relied upon by plaintiff here, and held:

> "*It is to be noted in this connection that the question whether said act confers arbitrary power is not to be determined by the fact that the power conferred may have been exercised arbitrarily as to the appellee.* If such is the case, possibly it may have some bearing on the interpretation of the power conferred. In the *Yick Wo* case Mr. Justice MATTHEWS seems to

intimate that the arbitrary action of the board of supervisors complained of therein did have an interpreting effect on the nature of the power conferred. *But we think Judge Sawyer struck a true note,* in the case of *Ex parte Christensen* (C. C.) 43 Fed. 243, 247, when he said:

> *'The validity of an ordinance must be determined by its terms, by what it authorizes, not by the manner of its execution. It is valid or invalid, irrespective of the manner in which it is in fact administered.* Its capability of being abused is the test.'" (Italics ours.)

In *State* v. *Hall* (Wis.), 190 N. W. 457, is found one of the most enlightening of the many state cases in point. The Supreme Court, in arguing against resort to extraneous matters where a statute plain within its own terms is to be construed, said:

"Were that so, then a law would be constitutional one day and the next it would be unconstitutional, because of the happening of an independent event. The constitutionality of laws does not depend upon such fortuitous circumstances. It is a well-established principle of law that the constitutionality of an act cannot be tested by the evidence in the particular case. *State* v. *Emery* (Wis.), 189 N. W. 571; *St. Louis* v. *Liessing*, 190 Mo. 464, 89 S. W. 611, 1 L. R. A. (N. S.) 918, 109 Am. St. Rep. 774, 4 Ann. Cas. 112. In the latter case the court says:

> 'The constitutionality of the law is not to be determined upon a question of fact in each case, but the courts determine for themselves upon the fundamental principles of our Constitution that the act of the legislature or municipal assembly is not to be declared void unless the violation of the Constitution is so manifest as to leave no room for reasonable doubt.'

"This in the nature of things must be so, *else a law would be constitutional under the facts found in one case and unconstitutional under the facts found in another, or it would be valid today, but void tomorrow, because of the happening of an extraneous event.* If such a view should obtain, the statute in question has been constitutional since its enactment in 1909, and until the Democrats in 1922 failed to poll a 10 per cent. vote at the primary, when it become unconstitutional. Such a test of constitutionality is unthinkable. That in the course of time oft-repeated experience may modify the judicial view as to constitutionality of laws is apparent; *but it should not and cannot be changed because of a few isolated instances.* Besides, one may well query the utility or necessity of a law whose violation is not contemplated." (Italics ours.)

The petitioner's contention, if sustained, would lead to the inextricable difficulties above stated. Wagoner County has only a very small part of the state's population. It is only one of seventy-seven counties of the state. There is not so much as an effort to show that any wrongs were inflicted by the registration officers throughout the state in the other seventy-six counties. The instances complained about in Wagoner County, if true, are so *isolated* and comparatively unimportant, when the vast population as a whole is considered, that the court cannot determine, even if it were material for consideration here, the general practice under the registration law throughout the state, although there is evidence in the record tending to show that large numbers of negroes were registered elsewhere (R. 48). We take it that the court will assume that no abuses existed in the other parts of the state. Assuming for argument that there were abuses in Wagoner County, they are without weight here.

Under another head, where we discuss the facts particularly, we undertake to show that the registration statutes were applied without distinction between the whites and the colored people of Wagoner County, and that in no instance was a qualified elector who complied with the registration laws, denied the right of registration.

In *State* v. *Layton* (Mo.), 61 S. W. 171, 177, the Supreme Court said:

> "The constitutionality of the law is not to be determined upon the question of fact in each case, but the courts determine for themselves upon the fundamental principles of our constitution, which vests the legislative power in the general assembly. * * *."

Many other decisions are to the same effect.

We now undertake to distinguish the cases claimed in petitioner's brief as support for the contention that the actual administrative results show that the registration law of Oklahoma is unconstitutional and void. The cases relied upon by plaintiff fall within two classes. *First*, those cases involving statutes doubtful or ambiguous in their terms, and *second*, those where the complaining parties had been deprived of their constitutional rights while administrative officers were acting without any statutory authority. Cooley, in his Constitutional Limitations, 6th Edition, commencing at page 84 in the excerpts quoted above, admits that there are at least some cases which apparently sustain plaintiff's theory upon this point. But he proceeds to show that this apparent support is what one might think he had found "on first reading". Having considered these "first reading" appearances of departure from the rule which he announces, he adheres to and firmly announces, without qualification, the doctrine that where no ambiguity or doubt appears in the law—in its own terms—no resort

can be had, for the purposes of construction, to administrative results. And this great authority, having fully considered the cases, summarizes as above holding:

> "these cases are not in conflict with the general rule as above laid down."

We come now to examine the case of *Yick Wo* v. *Hopkins*, 118 U. S. 356, 30 L. ed. 220, upon which petitioner really relies for his contention that the court may here look to administrative results in construing the registration laws of the state. This is the one outstanding case calculated to mislead a casual observer upon first reading of the opinion. No doubt the *Yick Wo* case contains some language of the sort to which Cooley referred in the above excerpts—language which might easily lead one to a misconception upon first consideration or "on first reading". No court however great, no judge however learned, is entirely free, at least upon occasion, from the use of language which may lead to a misconception of the intent of the court or judge in an opinion.

The learned judge who wrote the opinion in *Grainger* v. *Douglas*, 148 Fed. 513, *supra*, whilst announcing that "the constitutionality of a statute must be determined by its provisions and not by the manner in which it is in fact administered", considered the *Yick Wo* case carefully and undertook to place the language in the *Yick Wo* case, upon which plaintiff relies, beyond the misconception under which petitioner's brief writer seems to labor, notwithstanding ample opportunity to avoid the misconception. For the purpose, primarily no doubt, of showing that there is nothing in the *Yick Wo* case contrary to the doctrine in the *Grainger* case, it was said:

> "It is to be noted in this connection that the question whether said act confers arbitrary power is not

to be determined by the fact that the power conferred may have been exercised arbitrarily as to the appellee. If such is the case, possibly it may have some bearing on the interpretation of the power conferred. In the *Yick Wo* case Mr. Justice MATTHEWS seems to intimate that the arbitrary action of the board of supervisors complained of therein did have an interpreting effect on the nature of the power conferred. *But we think Judge Sawyer struck a true note,* in the case of *Ex parte Christensen* (C. C.) 43 Fed. 243, 247, when he said:

> *'The validity of an ordinance must be determined by its terms, by what it authorizes, not by the manner of its execution. It is valid or invalid, irrespective of the manner in which it is in fact administered.* Its capability of being abused is the test.'"

Careful study of the *Yick Wo* and other cases cited by plaintiff must lead to the conclusion announced by Judge COOLEY that these cases, all and singular, are those where there was such *doubt or ambiguity in the provisions of the statutes* as to justify resort to extraneous matters, including administrative results, which resort, when had, is only for the purpose of determining the legislative intent, for when that intent appears sufficiently clear, the courts determine the question as to whether or not a given statute is constitutional.

Under petitioner's proposition that the court may look to administrative results for interpretation of the statutes, only two cases other than *Yick Wo* v. *Hopkins* are cited. Both of them wholly fail to support petitioner's contention. *Henderson* v. *Mayor of New York,* 92 U. S. 259, 23 L. ed. 543, did not involve this point. It was there held that the provisions of the statute in question were void upon the face of the statute and upon their own terms. The state legislature had undertaken to regulate commerce with foreign

nations. The third case cited is *Minnesota v. Barber*, 136 U. S. 313, 34 L. ed. 455. That case does not present the point under discussion. The Minnesota statute was there held to be void because by its terms, which were free from ambiguity or doubt, the State of Minnesota undertook to regulate and hinder interstate commerce.

Finally, upon this point we quote Black on Interpretation of Laws, under the head of "Admissibility of Extrinsic Aids", pages 196-197, as follows:

> "In the interpretation of a statute, if a doubt or uncertainty as to the meaning of the legislature cannot be removed by a consideration of the act itself and its various parts, recourse may be had to extraneous facts, circumstances, and means of explanation, for the purpose of determining the legislative intent; but those only are admissible which are logically connected with the act in question, or authentic, or inherently entitled to respectful consideration.
>
> "*When Resort may be had to Extrinsic Aids.*
>
> "The cardinal rule of all statutory construction is that the meaning and intention of the legislature are to be sought for. This meaning and intention are to be sought first of all *in the statute itself*—in the words which the legislature has chosen to express its purpose. If these words convey a *definite, clear, and sensible meaning, that must be accepted as the meaning of the legislature, and it is not permissible to vary it or depart from it by reason of any considerations found outside the statute* or based on mere conjecture. In such case, there is no room for construction. But if the words of the law are not intelligible, *if there arises a substantial doubt as to their meaning or application, or if there is ambiguity on the face of the statute, then the endeavor must be made to ascertain the true meaning and intent of the legi lature. And to this end, first of all, the intrinsic aids for the interpretation of the statute are to be resorted to.* It should be read and con-

strued as a whole; its various parts should be compared; each doubtful word or phrase is to be read in the light of the context; the interpretation clause, if there is any, should be examined to see if it defines or explains the ambiguous part; and light may be sought from the title of the act, the preamble, and even the headings of the chapters and sections.

"But if these intrinsic aids are exhausted without success, if there still remains a substantial doubt or ambiguity then recourse may be had to extraneous facts, considerations and means of explanation, always with the same object, to find out the real meaning of the legislature." (Italics ours.)

(b) ***The challenge of a statute on the ground of unconstitutionality is not sustainable, unless the case is so clear as to be free of reasonable doubt.***

In Cooley's Constitutional Limitations, 6th Edition, at pages 216-217, under the head "Judicial Doubts on Constitutional Questions", the text is this:

"It has been said by an eminent jurist, that when courts are called upon to pronounce the invalidity of an act of legislation, passed with all the forms and ceremonies requisite to give it the force of law, they will approach the question with great caution, examine it in every possible aspect, and ponder upon it as long as deliberation and patient attention can throw any new light upon the subject, and never declare a statute void, *unless the nullity and invalidity of the act are placed, in their judgment, beyond reasonable doubt. A reasonable doubt must be solved in favor of the legislative action, and the act be sustained.*

" 'The question whether a law be void for its repugnancy to the constitution is at all times a question of much delicacy, which ought seldom, if ever, to be decided in the affirmative in a doubtful case. The court, when impelled by duty to render such a judg-

ment would be unworthy of its station could it be unmindful of the solemn obligation which that station imposes; but it is not on slight implication and vague conjecture that the legislature is to be pronounced to have transcended its powers, and its acts to be considered as void. The opposition between the constitution and the law should be such that the judge feels a clear and strong conviction of their incompatibility with each other.' Mr. Justice WASHINGTON gives a reason for this rule, which has been repeatedly recognized in other cases which we have cited. After expressing the opinion that the particular question there presented, and which regarded the constitutionality of a State law, was involved in difficulty and doubt, he says: 'But if I could rest my opinion in favor of the constitutionality of the law on which the question arises, on no other ground than this doubt so felt and acknowledged, that alone would, in my estimation, be a satisfactory vindication of it. It is but a decent respect due to the wisdom, the integrity, and the patriotism of the legislative body by which any law is passed, *to presume in favor of its validity, until its violation of the constitution is proved beyond all reasonable doubt.*'" (Italics ours.)

The applicable text in Black on Interpretation of Laws, pp. 93-94, is to the same effect, and as follows:

"Every act of the legislature is presumed to be valid and constitutional until the contrary is shown. All doubts are resolved in favor of the validity of the act. If it is fairly and reasonably open to more than one construction, that construction will be adopted which will reconcile the statute with the constitution and avoid the consequence of unconstitutionality.

"Legislators, as well as judges, are bound to obey and support the constitution, and it is to be understood that they have weighed the constitutional validity of every act they pass. Hence the presumption is always

in favor of the constitutionality of a statute; every reasonable doubt must be resolved in favor of the statute, not against; and the courts will not adjudge it invalid unless its violation of the constitution is, in their judgment, clear, complete, and unmistakable. Hence it follows that the courts will not so construe the law as to make it conflict with the constitution, but will rather put such an interpretation upon it as will avoid conflict with the constitution and give it full force and effect, if this can be done without extravagance. If there is doubt or uncertainty as to the meaning of the legislature, if the words or provisions of the statute are obscure, or if the enactment is fairly susceptible of two or more constructions, that interpretation will be adopted which will avoid the effect of unconstitutionality, even though it may be necessary, for this purpose, to disregard the more usual or apparent import of the language employed. 'It is the duty of the court to uphold a statute when the conflict between it and the constitution is not clear; that the implication which must always exist, that no violation has been intended by the legislature, may require the court, in some cases, where the meaning of the constitution is in doubt, to lean in favor of such a construction of the statute as might not at first view seem most obvious and natural. Where the meaning of the constitution is clear, the court, if possible, must give the statute such a construction as will enable it to have effect.' 'If, upon the construction we have been considering, the law in question would be void, or even of doubtful validity, it is our duty to find, if we are able, some other construction that will relieve it of this difficulty. If a law can be upheld by a reasonable construction, it ought to be done, and it is to be presumed that the legislature, in passing it, intended to enact a reasonable and just law, rather than an unreasonable and unjust one.'"

The reported cases upon this point are too numerous and too well known to require citation.

(c) ***Where a statute has l n long acquiesced in by the public and treated as valid by various governmental departments, ordinary presumption of constitutionality is greatly strengthened.***

—*City of Tulsa* v. *Southwestern Bell Telephone Co.*, 75 Fed. (2d) 343, 351. See citation supporting this rule under note 9 at said page 351.

(d) ***The test of a registration statute alleged to be discriminatory is this: Does the statute set up for one class of electors a different or additional standard of qualifications to vote, from that required of other electors? The "Grandfather Clause" having been held unconstitutional, was not applied in 1916. Plaintiff Lane and others similarly circumstanced were only required in 1916 to meet the same tests already met by the 1914 voters. A plaintiff cannot successfully complain on account of an illegal standard to which he was never subjected. There was no discrimination. The Circuit Court of Appeals held that there was no discrimination (R. 100-101). The requirement for mandatory registration of those who had voted in 1914, and whose names were on the 1914 lists of voters, was for convenience. There was uniformity in basis of qualification for registration.***

The first Oklahoma Legislature enacted general election laws for the state, the same being Chapter 31, Session Laws of Oklahoma 1907-1908. Provision was made for the registration of electors in cities of the first class only. Precinct election boards were provided for, consisting of an inspector, who was made chairman of the board, a judge, and a clerk, their respective duties were prescribed. One of the duties of the precinct board was to pass upon the qualifications of the unregistered voters. This duty was imposed primarily upon the inspector. An elaborate system was set up for challenging applicants to vote for lack of qualifications under the Constitution and laws of the state, and for their

examination with respect to qualifications. Though the statute has been amended upon some points, the duties of the precinct boards have remained substantially the same and now exist in substance as originally enacted. If Lane presented himself to a registrar in 1916, not being a resident of a city of the first class where registration had been made already, *he had to answer, satisfactorily, exactly the same questions which the 1914 voters answered to the satisfaction of the precinct board.* If it be assumed (we contend it cannot be so assumed) that the precinct board would have violated the Constitution by denying Lane the right to vote in 1914 if he had tried to vote, this assumption does not improve his position, for the manifest reason that in 1916 all he had to do for registration was to show he possessed the same qualifications as the 1914 voters. *He complains because of the illegal standard in the "Grandfather Clause" to which he never was subjected. We do not find any authority holding that an elector may complain of an illegal standard never applied to him, to his injury.*

The provision requiring that the registration officers place on the lists the names of all qualified electors who had voted in 1914, is not discriminatory. It is not unfair or unreasonable in any respect. The purpose of the requirement is plain and unobjectionable. The sole purpose of registration is to determine in advance of an election the persons who are qualified to vote, rather than to await the day for voting and there delay the election by inquiry as to qualifications. At the 1914 general election throughout the state all those who voted *had been examined by the election officials at the polls,* as required by the Oklahoma statutes. They were then and there properly adjudged to be legal voters. Hence there was no necessity whatever for another examination as to their qualifications.

Throughout his brief petitioner continuously refers to the 1916 Registration Law as a revitalization and continuance of the "Grandfather Clause". This it not true.

Section 1 of Article III of the Oklahoma Constitution was in full force and effect at the time of the election in in 1914. Said provision is as follows:

> "The qualified electors of this State shall be citizens of the United States, citizens of the State, including persons of Indian descent (native of the United States), who are over the age of twenty-one years, and who have resided in the State one year, in the County six months, and in the election precinct thirty days, next preceding the election at which such elector offers to vote. Provided, that no person adjudged guilty of a felony, subject to such exceptions as the Legislature may prescribe, nor any person, kept in a poorhouse at public expense, except Federal, Confederate and Spanish-American ex-soldiers or sailors, nor any person in a public prison, nor any idiot or lunatic, shall be entitled to register and vote."

The "Grandfather Clause", is as follows:

> "No person shall be registered as an elector of this State, or be allowed to vote in any election held herein unless he be able to read and write any section of the Constitution of the State of Oklahoma; but no person who was, on January 1st, 1866, or at any time prior thereto, entitled to vote under any form of government, or who at that time resided in some foreign nation, and no lineal descendent of such person, shall be denied the right to register and vote because of his inability to so read and write sections of such Constitution."

If the so-called "Grandfather Clause", was in fact enforced strictly in any given precinct of the State in 1914, the result as regards registration was this: Each appli-

cant had to meet not only the requirements of Section 1, Article III of the Constitution, *supra*, but also the provisions of the "Grandfather Clause", *supra*. In 1916, after the "Grandfather Clause" was stricken down by this Court, applicants for registration had to meet only the requirements of said Section 1, Article III of the Oklahoma Constitution. And it will be noted that the applicants for registration in 1916 were not required to meet any test in addition to the standard for 1914 already met by all the 1914 voters, *every one of whom was required to meet the test, just as provided in Section 1, Article III.* Thus, it will be seen that those who voted in 1914 were already examined and found to be qualified, and listed as such, all in accordance with said Section 1, Article III, and it will be further observed that every qualified elector of the State theretofore unregistered, whether white or colored, without any discrimination whatsoever, was required, if he desired to vote, to register in 1916, unless prevented by absence, sickness or unavoidable misfortune, and meet, upon making his application, precisely the same test (Sec. 1, Art. III, *supra)* as that successfully met by the 1914 voters. Thus the petitioner complains about ancient history.

Cooley on Constitutional Limitations, 6th Edition, at page 756, says that the purpose of registration prior to an election is to enable the election officers at the polls to avoid the haste and confusion that must attend the determination upon election day of the various and difficult questions concerning the right of individuals to exercise the franchise, and that by registration electors are notified in advance what persons have the right to vote. Nothing worth while could have been accomplished by requiring those who had been examined and *tested* in 1914, and who had shown themselves to be qualified, to go through the same proceeding again. The state authorities had the 1914 lists of the

electors. It was fair to all concerned, and business-like, and saved a great deal of trouble and expense, to accept the findings theretofore made by the election officers in 1914 and issue certificates without application to those whose names appeared on the 1914 rolls, and to require in 1916 the same test already applied to the 1914 voters to those who had not been tested in 1914.

The principle that it is not only proper, but necessary to adapt statutory regulations to the demands of convenience, is too sound and well-recognized to permit extended argument. This principle is clearly illustrated by the case of *Binswanger* v. *Whittle, et al.* (Md. 1938), 2 Atl. (2d) 174. There the Court of Appeals of Maryland was considering an attack upon the Maryland Registration Statutes, said attack being based upon the ground that the statutes provided different times for the electors to qualify, just as does the Oklahoma Registration Law of 1916. Bond, C. J., speaking for the court, said at page 175:

> "* * * Obviously the statutes have for many years adapted registration provisions to the demands of convenience in the various parts of the State, and the present complaint would involve a recasting of the registration system.
>
> "This court has, however, already expressed the opinion that uniformity in the times of registration in all portions of the State is not required by the Constitution. In *Bangs* v. *Fey*, 159 Md. 548, 556, 152 A. 508, 511, the court said, 'It was suggested that there might be some question of the validity of laws which provide for quadrennial registration in Baltimore, and for other times for general registration elsewhere in the state, but we fail to see the force of such argument * * * so long as the qualifications for registration are the same.' The requirement is thought to be concerned not with perfect uniformity in time and other conditions which would not substantially and

unreasonably affect the voting franchise of residents, but only with the more important matter of uniformity in the basis of the franchise. * * *"

The fact that the 1914 voters were *tested at the polls in 1914* (and were found to possess the qualifications set out in Section 1, Article III of the Oklahoma Constitution), and those who did not vote in 1914 were *tested by precisely the same standards in 1916* (as a prerequisite to registration), is unimportant. The petitioner cannot complain successfully, because of the mandatory requirement for the registration of the 1914 voters, who had already shown that they possessed the qualifications set out in Section 1, Article III of the State Constitution, for at the registration period in 1916 the electors only met the same test as that theretofore passed by the 1914 voters; that is, they showed the precinct registrars that they had the qualifications set out in said Section 1, Article III.

Let us note the classes of persons who had to come in for registration in 1916. They are these:

First. All those adult persons, *whether white or colored,* who resided in the precinct in 1914 and were entitled to vote there but failed to vote. If permitted to refer to statistics as to the state's population, and as to the number of persons who voted in 1914, we have no doubt we could show that a very large percent of the population, both white and colored, did not vote in 1914. And no doubt we could show that a greater number of whites failed to vote in 1914, than the number of negroes who then failed to vote. There is no showing in the record as to these percentages. It is matter of common knowledge that a very large percent of qualified electors do not vote at a general election. How can it be said that there was any discrimination between the great number of white people who were

qualified to vote in 1914 and failed to do so, and the negroes then qualified to vote, who did not do so? Can it be said that the vast number of white people qualified to vote in 1914, and who failed to do so, were discriminated against by the requirement to register the persons who had voted in 1914? No. Nor can it be said with respect to the colored people.

Second. All persons who were minors in 1914 and therefore unable to vote, and who had attained majority at the registration period in 1916, were subject to precisely the same requirements as those imposed upon Lane by the statutes, he not having voted in 1914. Can it be believed that the Legislature intended to discriminate against this great crowd of persons, white and colored, who had just attained majority? They were at the time of the 1916 registration exactly in the position of Lane, but for a different reason.

Third. The many electors who had moved in from without the State of Oklahoma, and here acquired the right to vote after the 1914 elections, were subject to the same requirements as the plaintiff Lane. At that period of the state's history there was a large influx from other states. Was there a discrimination as to this class?

Fourth. After the 1914 election (November 5, 1918, by amendment of the state Constitution at Sec. 1, Art. 3) the women—about half of the population of the state—acquired for the first time the right to vote at a general election. No statute was ever enacted to save the women from the requirements placed upon those who did not vote in 1914. All of them had to appear before registration officers, just as Lane was required to do, and establish their qualifications, and become registered in order to vote.

(e) ***An examination of all the cases where registration laws have been stricken down upon the ground that they were discriminatory, shows that in every instance the statutes in question were overthrown because as to a given and complaining class statutory requirement was made for subjecting that class to an additional or different standard of qualifications to vote than that required of others. Exactly the same standards of qualifications to vote have always been required under the registration law of Oklahoma, as to all classes. The election officers at the polls in 1914 tested the voters by the same standards applied by the registrars in 1916. Petitioner's contention that the statutes are discriminatory appears to be without precedent.***

Myers v. *Anderson, supra,* upon which the petitioner undertakes to stand, squarely applies this test. The inquiry there was, did the statute fixing the qualifications of electors set up one standard for the white people, and another for the colored? It was held that the statute was void because it did require of the negroes a different standard of qualifications to vote than that required of the whites. If this Court considers the question as to whether or not the registration statutes of Oklahoma are valid, this test must dispose of the case in favor of the respondents, for as shown above, *in 1916 no test of qualifications of electors was required beyond that required of those who voted in 1914.*

(f) ***Petitioner's contention that the Oklahoma Registration Law is void because of the time limit for registration is not well founded.***

We find, upon careful examination, that the cases cited in support of this contention are not in point.

As typical of the cited cases, attention is called to the following, from petitioner's brief, page 64:

"The third syllabus of the above cited case of *Atty. Gen.* v. *City of Detroit* (1889), 78 Mich. 545, 44 N. W. 388, is as follows:

> "'The act is unreasonable and void because it provides for but five registration days during the year, at one of which the elector must make personal application for registration; *thus disfranchising persons who are ill or absent on registration days, but who would be able to vote on election days.*'" (Italics ours.)

It will be observed that the Michigan statute under consideration made no provision to protect those who were absent, sick, or otherwise prevented from registration by unavoidable misfortune. The Oklahoma law under attack provides for a ten-day registration period, and further provision is made fully protecting those who were unable to register within the ten day period because of absence, illness, or other good cause. Those who had excuse for not registering within the ten days were allowed an additional period of *fifty days,* which fifty-day period commenced sometime later.

It is urged that under the Oklahoma law, the petitioner, Lane, had to be registered within the ten-day registration period in 1916, or forever thereafter be barred from voting. There is nothing in the statutes to justify petitioner's conclusion upon this point. It does appear that he is barred from voting until such time as the Legislature may cover the matter of suffrage by additional legislation. So long as there is no discrimination the entire matter lies with the Legislature.

With respect to the contention that the 1916 period for registration was unreasonably short the respondents say that the petitioner cannot be heard to raise this question for he alleges in his petition, and testified at the trial, that

he applied to his precinct registrar in 1916 for registration, and was refused. If the period had been six months instead of ten days, the result would have been precisely the same in the case of Lane and others similarly situated. We take it as fundamental that one may not successfully challenge a statute upon the ground of unreasonable time limit, whilst admitting that he has not been affected by the shortness of the period of which complaint is made.

The quare in this case is with respect to alleged discrimination. Examination of the various statutory provisions for registration must lead to the conclusion that there was no discrimination, merely because the legislature has determined that as a matter of policy the period for registration should be ten days.

As a further expression of such policy, section 5666, O. S. 1931, provides:

> "If the qualifications of electors of the State of Oklahoma are changed by constitutional amendment after the permanent registration provided for in this Act shall have been completed, it shall be the duty of the proper officers provided for in this Act, to make a new registration of the qualified electors of each precinct in the State of Oklahoma in the same manner as provided in this Act. The precinct registrars shall make the new registration during the first ten days immediately following the first thirty days after such constitutional amendment has become effective. Provided, if any elector should be absent from the county of his residence during such period of time, or is prevented by sickness or unavoidable misfortune from registering with the precinct registrar, within such time, he may register with such precinct registrar at any time within thirty days after the close of such registration period upon complying with the other provisions of this Act, and the precinct registrar shall register no person under this provision unless he shall

be satisfied that such person was absent from the county or was sick during the aforesaid ten days' registration period, or was prevented from registration during such period by unavoidable misfortune. Such new registration when the same has been completed as provided in this Act, shall be filed in the office of the county clerk, and shall then become and be the permanent registration of the qualified electors in each county of the State."

We have called attention to the 1918 amendment to the Constitution of Oklahoma, which gave to women the right of suffrage. Theretofore they had not had this privilege in Oklahoma. When granted the right of suffrage, they were registered under the above quoted Section 5666. As to time limit for registration, and as to excuses for which they were given additional time, the provisions are the same as those of Section 5654 applicable in 1916. Thus, it is clear that from the first the Oklahoma Legislature has made no discrimination against negroes. The petitioner goes too far in charging the law makers of Oklahoma with intention to deprive colored persons of the right of suffrage by the statutory provisions relating to registration, because every white person, whether man or woman, has been subjected to the same requirements as those which Lane had to meet.

(g) ***Further as to petitioner's contention that the negroes of Oklahoma were discriminated against by the statutory provisions making it the duty of precinct registrars to issue registration certificates to qualified electors who voted in the general election of 1914.***

Petitioner complains of the provisions for the registration of the qualified 1914 voters, which provisions are found in the latter part of Section 5654, O. S. 1931. These provisions should be considered in light of the following facts, namely:

That the 1914 voters had already met the qualifications set out in Section 1, Article III of the Oklahoma Constitution;

That the purpose of the Registration Law was to establish a permanent list of the qualified electors;

That the State officials had (in 1911) already compiled a portion of such permanent list;

That the use of this 1914 list greatly facilitated performance of the enormous task of compiling the permanent registration record, thus effecting a great saving in time, labor and expense to the State;

When so considered it is readily apparent that the purpose of such provisions was to expedite and simplify the registration of all qualified electors. No sound reason, either practical or theoretical, can be advanced for requiring the qualified voters of 1914 to again apply and show their qualifications.

Respectfully submitted,

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P. 5

SUPREME COURT OF THE UNITED STATES.

No. 460.—October Term, 1938.

I. W. Lane, Petitioner, vs. Jess Wilson, John Moss and Marion Parks.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Tenth Circuit.

[May 22, 1939.]

Mr. Justice Frankfurter delivered the opinion of the Court.

The case is here on *certiorari* to review the judgment of the Circuit Court of Appeals for the Tenth Circuit affirming that of the United States District Court for the Eastern District of Oklahoma, entered upon a directed verdict in favor of the defendants. The action was one for $5,000 damages brought under Section 1979 of the Revised Statutes (8 U. S. C. § 43), by a colored citizen claiming discriminatory treatment resulting from electoral legislation of Oklahoma, in violation of the Fifteenth Amendment. *Certiorari* was granted, 306 U. S. —, because of the importance of the question and an asserted conflict with the decision in *Guinn* v. *United States*, 238 U. S. 347.

The constitution under which Oklahoma was admitted into the Union regulated the suffrage by Article III, whereby its "qualified electors" were to be "citizens of the State . . . who are over the age of twenty-one years" with disqualifications in the case of felons, paupers and lunatics. Soon after its admission the suffrage provisions of the Oklahoma Constitution were radically amended by the addition of a literacy test from which white voters were in effect relieved through the operation of a "grandfather clause." The clause was stricken down by this Court as violative of the prohibition against discrimination "on account of race, color or previous condition of servitude" of the Fifteenth Amendment. This outlawry occurred on June 21, 1915. In the meantime the Oklahoma general election of 1914 had been based on the offending "grandfather clause." After the invalidation of that clause a special session of the Oklahoma legislature enacted a new scheme

for registration as a prerequisite to voting. Oklahoma Laws of 1916, Act of February 26, 1916, c. 24. Section 4 of this statute (now Section 5654, Oklahoma Statutes 1931, 26 Okla. St. Ann. 74)[1] was obviously directed towards the consequences of the decision in *Guinn* v. *United States, supra.* Those who had voted in the general election of 1914, automatically remained qualified voters. The new registration requirements affected only others. These had to apply for registration between April 30, 1916 and May 11, 1916, if qualified at that time, with an extension to June 30, 1916, given only to those "absent from the county . . . during such period of time, or . . . prevented by sickness or unavoidable misfortune from registering . . . within such time". The crux of the present controversy is the validity of this registration scheme, with its dividing line between white citizens who had voted under the "grandfather clause" immunity prior to *Guinn* v. *United States, supra,* and citizens who were outside it, and the not more than 12 days as the normal period of registration for the theretofore proscribed class.

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[1] "It shall be the duty of the precinct registrar to register each qualified elector of his election precinct who makes application between the thirtieth day of April, 1916, and the eleventh day of May, 1916, and such person applying shall at the time he applies to register be a qualified elector in such precinct and he shall comply with the provisions of this act, and it shall be the duty of every qualified elector to register within such time; provided, if any elector should be absent from the county of his residence during such period of time, or is prevented by sickness or unavoidable misfortune from registering with the precinct registrar within such time, he may register with such precinct registrar at any time after the tenth day of May, 1916, up to and including the thirtieth day of June, 1916, but the precinct registrar shall register no person under this provision unless he be satisfied that such person was absent from the county or was prevented from registering by sickness or unavoidable misfortune, as hereinbefore provided. And provided that it shall be the mandatory duty of every precinct registrar to issue registration certificates to every qualified elector who voted at the general election held in this state on the first Tuesday after the first Monday in November, 1914, without the application of said elector for registration, and, to deliver such certificate to such elector if he is still a qualified elector in such precinct and the failure to so register such elector who voted in such election held in November, 1914, shall not preclude or prevent such elector from voting in any election in this state; and provided further, that wherever any elector is refused registration by any registration officer such action may be reviewed by the district court of the county by the aggrieved elector by his filing within ten days a petition with the Clerk of said court, whereupon summons shall be issued to said registrar requiring him to answer within ten days, and the district court shall be a expeditious hearing and from his judgment an appeal will lie at the instance of either party to the Supreme Court of the State as in civil cases; and provided further, that the provisions of this act shall not apply to any school district elections. Provided further, that each county election board in this state shall furnish to each precinct election board in the respective counties a list of the voters who voted at the election in November, 1914, and such list shall be conclusive evidence of the right of such person to vote."

The petitioner, a colored citizen of Oklahoma, who was the plaintiff below and will hereafter be referred to as such, sued three county election officials for declining to register him on October 17, 1934. He was qualified for registration in 1916 but did not then get on the registration list. The evidence is in conflict whether he presented himself in that year for registration and, if so, under what circumstances registration was denied him. The fact is that plaintiff did not get on the register in 1916. Under the terms of the statute he thereby permanently lost the right to register and hence the right to vote. The central claim of plaintiff is that of the unconstitutionality of Section 5654. The defendants joined issue on this claim and further insisted that if there had been illegality in a denial of the plaintiff's right to registration, his proper recourse was to the courts of Oklahoma. The District Court took the case from the jury and its action was affirmed by the Circuit Court of Appeals. It found no proof of discrimination against negroes in the administration of Section 5654 and denied that the legislation was in conflict with the Fifteenth Amendment. 98 F. (2d) 980.

The defendants urge two bars to the plaintiff's recovery, apart from the constitutional validity of Section 5654. They say that on the plaintiff's own assumption of its invalidity, there is no Oklahoma statute under which he could register and therefore no right to registration has been denied. Secondly, they argue that the state procedure for determining claims of discrimination must be employed before invoking the federal judiciary. These contentions will be considered first, for the disposition of a constitutional question must be reserved to the last.

The first objection derives from a misapplication of *Giles* v. *Harris*, 189 U. S. 475. In that case a bill in equity was brought by a colored man on behalf of himself "and on behalf of more than five thousand negroes, citizens of the county of Montgomery, Alabama, similarly situated" which in effect asked the federal court "to supervise the voting in that State by officers of the court." What this Court called a "new and extraordinary situation" was found "strikingly" to reinforce "the argument that equity cannot undertake now, any more than it has in the past, to enforce political rights". See 189 U. S. at 487.[2] Apart from this traditional re-

[2] See also, In re Sawyer, 124 U. S. 200; Walton v. House of Rep., 265 U. S. 487; 4 POMEROY, EQUITY § 1743 *et seq.*; Pound, *Equitable Relief Against Defamation and Injuries to Personality*, 29 HARV. L. REV. 640, 681.

striction upon the exercise of equitable jurisdiction there was another difficulty in *Giles* v. *Harris*. The plaintiff there was in effect asking for specific performance of his right under Alabama electoral legislation. This presupposed the validity of the legislation under which he was claiming. But the whole theory of his bill was the invalidity of this legislation. Naturally enough, this Court took his claim at its face value and found no legislation on the basis of which specific performance could be decreed.[3]

This case is very different from *Giles* v. *Harris*—the difference having been explicitly foreshadowed by *Giles* v. *Harris* itself. In that case this Court declared "we are not prepared to say that an action at law could not be maintained on the facts alleged in the bill." 189 U. S. at 485. That is precisely the basis of the present action, brought under the following "appropriate legislation" of Congress to enforce the Fifteenth Amendment:

"Every person who, under color of any statute, . . . of any State, subjects, or causes to be subjected, any citizen of the United States . . . within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, ..."[4]

The Fifteenth Amendment secures freedom from discrimination on account of race in matters affecting the franchise. Whosoever "under color of any statute" subjects another to such discrimination thereby deprives him of what the Fifteenth Amendment secures and, under Section 1979 becomes "liable to the party injured in an action at law." The theory of the plaintiff's action is that the defendants, acting under color of Section 5654, did discriminate against him because that Section inherently operates discriminatorily. If this claim is sustained his right to sue under R. S. Sec-

[3] "If the sections of the constitution concerning registration were illegal in their inception, it would be a new doctrine in constitutional law that the original invalidity could be cured by an administration which defeated their intent. We express no opinion as to the alleged fact of their unconstitutionality beyond saying that we are not willing to assume that they are valid, in the face of the allegations and main object of the bill, for the purpose of granting the relief which it was necessary to pray in order that that object should be secured." 189 U. S. at 487. Recognition of the difference between an action for damages and the equitable relief prayed for in Giles v. Harris was repeated at the close of the opinion. See 189 U. S. at 488. Justices Harlan, Brewer, and Brown were of the opinion that it was competent for a federal court to grant even the equitable relief asked for in Giles v. Harris.

[4] The Act of April 20, 1871, c. 22, 17 Stat. 13, which became Section 1979 of the Revised Statutes, and is now 8 U. S. C. § 43.

tion 1979 follows. The basis of this action is inequality of treatment though under color of law, not denial of the right to vote. Compare *Nixon* v. *Herndon*, 273 U. S. 536.

The other preliminary objection to the maintenance of this action is likewise untenable. To vindicate his present grievance the plaintiff did not have to pursue whatever remedy may have been open to him in the state courts. Normally, the state legislative process, sometimes exercised through administrative powers conferred on state courts, must be completed before resort to the federal courts can be had. *Prentis* v. *Atlantic Coast Line Co.*, 211 U. S. 210. But the state procedure open for one in the plaintiff's situation (Section 5654) has all the indicia of a conventional judicial proceeding and does not confer upon the Oklahoma courts any of the discretionary or initiatory functions that are characteristic of administrative agencies. See Section 1 of Article IV of the Oklahoma Constitution; *Oklahoma Cotton Ginners' Ass'n* v. *State*, 174 Okla. 243. Barring only exceptional circumstances, see *e.g. Gilchrist* v. *Interborough Rapid Transit Co.*, 279 U. S. 159, or explicit statutory requirements, *e. g.* 48 STAT. 775; 50 STAT. 738; 28 U. S. C. § 41(1), resort to a federal court may be had without first exhausting the judicial remedies of state courts. *Bacon* v. *Rutland R. R.*, 232 U. S. 134; *Pacific Tel. & Tel. Co.* v. *Kuykendall*, 265 U. S. 196.

We therefore cannot avoid passing on the merits of plaintiff's constitutional claims. The reach of the Fifteenth Amendment against contrivances by a state to thwart equality in the enjoyment of the right to vote by citizens of the United States regardless of race or color, has been amply expounded by prior decisions. *Guinn* v. *United States*, 238 U. S. 347; *Myers* v. *Anderson*, 238 U. S. 368. The Amendment nullifies sophisticated as well as simple-minded modes of discrimination. It hits onerous procedural requirements which effectively handicap exercise of the franchise by the colored race although the abstract right to vote may remain unrestricted as to race. When in *Guinn* v. *United States, supra*, the Oklahoma "grandfather clause" was found violative of the Fifteenth Amendment, Oklahoma was confronted with the serious task of devising a new registration system consonant with her own political ideas but also consistent with the Federal Constitution. We are compelled to conclude, however reluctantly, that the legislation of 1916 partakes too much of the infirmity of the "grandfather clause" to be able to survive.

Section 5652 of the Oklahoma statutes makes registration a prerequisite to voting.[5] By Sections 5654 and 5659[6] all citizens who were qualified to vote in 1916 but had not voted in 1914 were required to register, save in the exceptional circumstances, between April 30 and May 11, 1916, and in default of such registration were perpetually disenfranchised. Exemption from this onerous provision was enjoyed by all who had registered in 1914. But this registration was held under the statute which was condemned in the *Guinn* case. Unfair discrimination was thus retained by automatically granting voting privileges for life to the white citizens whom the constitutional "grandfather clause" had sheltered while subjecting colored citizens to a new burden. The practical effect of the 1916 legislation was to accord to the members of the negro race who had been discriminated against in the outlawed registration system of 1914, not more than 12 days within which to reassert constitutional rights which this Court found in the *Guinn* case to have been improperly taken from them. We believe that the opportunity thus given negro voters to free themselves from the effects of discrimination to which they should never have been subjected was too cabined and confined. The restrictions imposed must be judged with reference to those for whom they were designed. It must be remembered that we are dealing with a body of citizens lacking the habits and traditions of political independence and otherwise living in circumstances which do not encourage initiative and enterprise. To be sure, in exceptional cases a supplemental period was available. But the narrow basis of the supplemental registration, the very brief normal period of relief for the persons and purposes

[5] "It shall be the duty of every qualified elector in this state to register as an elector under the provisions of this Act, and no elector shall be permitted to vote at any election unless he shall register as herein provided, and no elector shall be permitted to vote in any primary election of any political party except of the political party of which his registration certificate shows him to be a member." Section 2, Oklahoma Laws of 1916, c. 24.

[6] "Any person who may become a qualified elector in any precinct in this State after the tenth day of May, 1916, or after the closing of any other registration period, may register as an elector by making application to the registrar of the precinct in which he is a qualified voter, not more than twenty nor less than ten days before the day of holding any election and upon complying with all the terms and provisions of this Act, and it shall be the duty of precinct registrars to register such qualified electors in their precinct under the terms and provisions of this Act, beginning twenty days before the date of holding any election and continuing for a period of ten days. Precinct registrars shall have no authority to register electors at any time except as provided in this Act and no registration certificate issued by any precinct registrar at any other time except as herein provided shall be valid." Section 9, Oklahoma Laws of 1916, c. 24.

in question, the practical difficulties, of which the record in this case gives glimpses, inevitable in the administration of such strict registration provisions, leave no escape from the conclusion that the means chosen as substitutes for the invalidated "grandfather clause" were themselves invalid under the Fifteenth Amendment. They operated unfairly against the very class on whose behalf the protection of the Constitution was here successfully invoked.

The judgment of the Circuit Court of Appeals must, therefore, be reversed and the cause remanded to the District Court for further proceedings in accordance with this opinion.

Mr. Justice McREYNOLDS and Mr. Justice BUTLER think that the court below reached the right conclusion and that its judgment should be affirmed.

Mr. Justice DOUGLAS took no part in the consideration or disposition of this case.

A true copy.

Test:

Clerk, Supreme Court, U. S.